Petition

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In the Supreme Court of the United States

October Term, 1981

JOHN C. WATKINS, COMMISSIONER, ET AL.,
Petitioners,

vs.

JOHN LEWIS WASHINGTON,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTIONS PRESENTED

A.

Whether the Court of Appeals, despite Washington's failure to object at trial to sentencing instruction C-20, erroneously decided as a matter of law that the rule of *Wainwright v. Sykes*, 433 U.S. 72 (1977), was inapplicable to Washington's federal claim that C-20 operated to prevent, in violation of *Lockett v. Ohio*, 438 U.S. 586 (1978), the sentencer's consideration of nonstatutory mitigating factors proffered as a basis for a sentence less than death.

B.

1. Whether, on the facts of this case and in light of the totality of the circumstances, the Court of Appeals erroneously concluded that sentencing instruction C-20, in violation of the Eighth and Fourteenth Amendments, operated to preclude from the sentencer's consideration as nonstatutory mitigating factors any aspect of the defendant's character or record that the defendant proffered as a basis for a sentence less than death.

2. Whether the Court of Appeals erroneously concluded that the granting of sentencing instruction C-20 violated the Due Process Clause of the Fourteenth Amendment by so infecting the sentencing proceedings as to drain them of fundamental fairness.

3. Whether an amorphous "possibility" that a sentencing jury misunderstood what it could and could not consider in mitigation violates the Eighth and Fourteenth Amendments by creating a substantial risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty.

TABLE OF CONTENTS

I. PREFACE 1

II. OPINIONS BELOW 1

III. JURISDICTION 2

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 3

V. STATEMENT OF THE CASE 3

VI. REASONS FOR GRANTING THE WRIT 10

VII. ARGUMENT 12

A. The Decision of the Court of Appeals Declining to Apply the Rule in *Wainwright v. Sykes* Is in Conflict With *Sykes* Itself 12

B. The Decision of the Court of Appeals Is at Odds With Prior Decisions of This Court Because, on the Facts of This Case and in Light of the Totality of the Circumstances, the Granting of Sentencing Instruction C-20 Neither Operated to Preclude From the Sentencer's Consideration Nonstatutory Mitigating Factors nor Did It So Infect the Sentencing Proceedings As to Drain Them of Fundamental Fairness 22

VIII. CONCLUSION 33

CERTIFICATE OF SERVICE 35

TABLE OF APPENDICES—

APPENDIX 1: Panel Decision of Court of Appeals A-1

APPENDIX 2: Decision of Court of Appeals Denying Panel Rehearing and Suggestion for Rehearing En Banc A-77

APPENDIX 3: Excerpts from Memorandum Opinion of District Court A-81

APPENDIX 4: Excerpts from Report and Recommendation of United States Magistrate A-83

APPENDIX 5: State Court Opinion on Direct Appeal A-86

APPENDIX 6: Sentencing Instruction C-20 ..... A-103

APPENDIX 7: Excerpts from Memorandum of Law Filed in District Court by Commissioner Watkins A-106

APPENDIX 8: Mitigating Testimony Proffered by Washington at his Sentencing Hearing A109

TABLE OF CASE AUTHORITIES

Bennett v. State, 211 So.2d 520 (Miss. 1968) 14

Berryhill v. Byrd, 384 So.2d 1026 (Miss. 1980) 18

Clark v. State, 260 So.2d 445 (Miss. 1972) 17

Collins v. State, 368 So.2d 212 (Miss. 1979) 18

County Court of Ulster County v. Allen, 442 U.S. 140, 154 (1979) 18, 19

Cupp v. Naughten, 414 U.S. 141 (1973) 10, 23, 30

Depriest v. State, 377 So.2d 615 (Miss. 1979) 18

Eddings v. Oklahoma, 50 LW 4161 (January 19, 1982) 23, 25, 29, 31, 32

Entrican v. State, 309 So.2d 851 (Miss. 1975) 18

Gray v. State, 375 So.2d 994, 1003-04 (Miss. 1979) 16

Green v. Georgia, 442 U.S. 95 (1979) 32

Hassell v. State, 92 So.2d 194 (Miss. 1957) 14

Henderson v. Kibbe, 431 U.S. 145 (1977) 23, 31

Jackson v. State, 337 So.2d 1242 (Miss. 1976) 16, 20

Lockett v. Ohio, 438 U.S. 586 (1978) .....*passim*
Picard v. Connor, 404 U.S. 270, 275-277 (1971) 21
Ramseur v. State, 368 So.2d 842 (Miss. 1979) 14
Sandstrom v. Montana, 442 U.S. 510 (1979) 10, 22-23, 25
Spivey v. Zant, 661 F.2d 464 (5 Cir. Nov. 16, 1981) 11
Wainwright v. Sykes, 433 U.S. 72 (1977) .....*passim*
Warren v. State, 369 So.2d 483 (Miss. 1979) 13
Washington v. State, 361 So.2d 61 (Miss. July 12, 1978) (en banc), cert. denied 441 U.S. 916 (April 16, 1979) 2, 15, 16
Washington v. Watkins, 655 F.2d 1346 (5 Cir. 1981) ....*passim*
Washington v. Watkins, 662 F.2d 1117 (5 Cir. 1981) 1
Washington v. Watkins, Cause No. GC 79-93-K-P (N.D. Miss. December 19, 1979) 2

STATUTES CITED

28 U.S.C. § 1254 (1) 2
28 U.S.C. § 2254 (a) 3
§ 99-19-101, Miss. Code 1972 Ann. 5, 7, 16, 20
§ 99-35-145, Miss. Code 1972 Ann. 19

STATE PROCEDURAL RULES CITED

Rule 6(b), Miss. Sup. Ct. Rules (1976) 14
Rule 14, Miss. Sup. Ct. Rules 5
Rule 38, Miss. Sup. Ct. Rules (1976) 19
Rule 42, Miss. Sup. Ct. Rules (1976) 17

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

I. PREFACE

Petitioners pray that a writ of certiorari issue to review the opinions of the United States Court of Appeals for the Fifth Circuit, viz., the panel decision dated September 14, 1981, and the denial of the Petition for Rehearing and Suggestion for Rehearing En Banc, dated December 3, 1981.

II. OPINIONS BELOW

Court of Appeals. The panel decision of the Court of Appeals is reported as *Washington v. Watkins,* 655 F.2d 1346 (5 Cir. 1981). (Appendix 1 at A-1) The per curiam opinion of the Court of Appeals denying panel rehearing and rehearing en banc is reported as *Washington v. Watkins,* 662 F.2d 1117 (5 Cir. 1981). (Appendix 2 at A-77)

District Court. The memorandum opinion of the United States District Court for the Northern District of Mississippi denying Washington's writ of habeas corpus is unreported. *SEE*: *Washington v. Watkins,* Cause No. GC 79-93-K-P (N.D. Miss. December 19, 1979). That portion of the district court's opinion applicable to the questions and claims presented by the present petitioners is set forth in Appendix 3 at A-81. In addition, the relevant parts of the Report and Recommendation penned by the United States Magistrate, to whom the habeas petition was initially referred, appear as Appendix 4 at A-83.

State Court. The opinion of the Supreme Court of Mississippi upholding on direct appeal Washington's capital murder conviction and the sentence of death that immediately followed is reported as *Washington v. State,* 361 So.2d 61 (Miss. July 12, 1978) (en banc), cert. denied 441 U.S. 916 (April 16, 1979). (Appendix 5 at A-86) No written opinion flowed in the wake of Washington's quest for state post-conviction relief. His application for leave to file in the trial court a petition for writ of error coram nobis was summarily denied by the Supreme Court of Mississippi on May 25, 1979.

III. JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered September 14, 1981. Timely petitions for panel rehearing and rehearing en banc were denied on December 3, 1981. The judgment of the Court of Appeals was issued, as and for the mandate, on December 15, 1981. Our petition for certiorari has been filed within the ninety day timeframe prescribed by law and the rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

IV. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States, viz.,

> ". . . nor shall any State deprive any person of life, liberty, or property without due process of law. . .";

the Cruel and Unusual Punishment Clause of the Eighth Amendment to the Constitution as applied to the States through the Due Process Clause of the Fourteenth Amendment; and 28 U.S.C. § 2254 (a), viz.,

> ". . . a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to a judgment of a State Court only on the ground that he is in custody in violation of the Constitution or laws . . . of the United States."

V. STATEMENT OF THE CASE

Respondent John Lewis Washington was tried May 24, 25, and 26, 1977, in the Circuit Court of Lowndes County, Mississippi for the March, 1977, capital murder of J.K. Woods.[1] At the conclusion of the guilt-finding phase of the bifurcated trial, a jury returned a verdict of guilty of capital murder.

During the sentence-determining hearing that followed, Washington took the witness stand and, sans a single evidentiary objection of prosecutorial origin, proffered testimony focusing upon certain statutory and nonstatutory mitigating circumstances. At the close of the second pro-

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1. Shotgun slaying committed by respondent while he and his accomplice were engaged in the commission of armed robbery.

ceeding, the lower court granted substantive sentencing instruction C-20. (Appendix 6 at A-103) There was no objection by Washington's trial counsel to the form or content of this charge.

The sentencing jury returned the following verdict of death:

> "We the jury unanimously find that the aggravating circumstances of one, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery; two, the defendant Johnny Lewis Washington committed the captial murder in an especially heinous, atrocious, or cruel manner are sufficient to impose the death penalty. That there are insufficient mitigating circumstances to outweigh the aggravating circumstances. And we unanimously find that the defendant should suffer death. S.E. Nolen, Foreman of the Jury."

On direct appeal to the Supreme Court of Mississippi two errors, and two only, were assigned by the attorney who defended Washington at trial. Washington argued that:

(1) Section 99-19-101(5)(h) of the Mississippi Code of 1972 [the "especially heinous" aggravating factor] is unconstitutionally vague, and

(2) The imposition of the death penalty is unconstitutional per se.

Both parties filed appellate briefs, and the cause was argued orally before the State Supreme Court on May 9, 1978. While Washington's appeal was under appellate consideration in the reviewing Court, the Supreme Court of the United States, on July 3, 1978, decided *Lockett v. Ohio*,

438 U.S. 586 (1978). One week post-*Lockett*—July 12, 1978—the Supreme Court of Mississippi decided Washington's case.

Although it did not have a *Lockett* claim directly before it for appellate consideration, our Court, at the conclusion of its written opinion, elected to distinguish *Lockett*. (Appendix 5 at A-100) It did so *sua sponte* and in a statutory context, observing that *"Lockett* bears no resemblance to *Washington"* because Section 99-19-101 provides, *inter alia,* that at the sentencing hearing ". . . evidence may be presented as to *any matter that the court deems relevant to sentence,* and shall include matters relating to *any of the* aggravating or *mitigating circumstances."* The Court interpreted the italicized portion of the statute, *supra,* to mean that ". . . the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be *reasonably relevant."* (Appendix 5 at A-101) Accordingly, respondent's conviction and sentence of death were affirmed.

On January 23, 1979, Washington, by and through substitute counsel, filed a motion to suspend the Mississippi Supreme Court rules and allow a petition for rehearing out of time. That motion was denied on January 24, 1979.[2] On January 23, 1979, Washington's substitute counsel also sought certiorari. No challenge to the legal sufficiency of instruction C-20 appeared in the petition.

Following this Court's denial of certiorari on April 16, 1979, Washington filed, on May 23, 1979 [nine months post-*Lockett*], his application for post-conviction relief in

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2. Rule 14 of the Rules of the Supreme Court of Mississippi require that rehearing be sought "[w]ithin fifteen (15) days after a decision is handed down on the merits. . ." Consequently, the time for filing a Petition For Rehearing in the State reviewing court expired on July 27, 1978.

the State Supreme Court. Once again, Washington eschewed in his pleading any challenge to the constitutional integrity of sentencing instruction C-20. Post-conviction redress was summarily denied on May 25, 1979.

On or about May 24, 1979, Washington filed in the United States District Court for the Northern District of Mississippi his "Petition For Writ of Habeas Corpus." No challenge to the constitutional integrity of sentencing instruction C-20 was presented in Washington's initial pleading nor did he predicate his allegation of trial counsel's ineffectiveness on the ground that counsel failed to object to the charge.

On May 25, 1979, Washington's motion to stay his execution—scheduled at the time for May 28th—was argued orally before the District Court for the Northern District of Mississippi. Prior to argument the district judge stated into the record of the proceedings that "[t]he court was advised by telephone this morning from the Supreme Court of Mississippi that the [post-conviction] Writ of Error Coram Nobis had been denied by that Court and that State remedies have been thoroughly exhausted." Washington thereafter argued, *inter alia*, that sentencing instruction C-20 limited the jury's consideration of mitigating circumstances to the two statutory factors appearing in the trial court's instruction.

On June 1, 1979, Commissioner Watkins, by and through his counsel of record, filed an "Answer and Return" to the habeas petition. It consisted largely of general denials to each and every allegation made in Washington's pleading. On June 7, 1979, Washington filed a "Traverse and Motion To Stay Proceedings and Motion for Discovery and Evidentiary Hearing." Two additional issues of constitutional dimension were alleged in the trav-

erse, but the constitutional sufficiency of sentencing instruction C-20 was not one of them.

On the 14th of June, 1979, Washington filed in the district court a "First Supplemental Memorandum In Support of Motion for Petition for Writ of Habeas Corpus." There the broad allegation in section V(5) of the original habeas petition that § 99-19-101, "[a]s applied in this case [,] . . . limited the jury's consideration of mitigating circumstances," was transformed into a claim that ". . . the statute on its face limits the 'mitigating factors' that a capitally charged person may prove and . . . likewise . . . the [lower] Court's instruction C-20 limited 'mitigating factors' that were presented by the defendant."

On June 28, 1979, habeas respondent, Watkins, filed a motion to dismiss Washington's petition for want of exhaustion of state remedies. We directed our argument to several constitutional allegations contained in the pleading but eschewed any contention that the belated federal challenge to instruction C-20 was one of the unexhausted claims.

Finally, on July 24, 1979, Commissioner Watkins submitted to the district court a 101 page "Memorandum In Support of Answer and Return to Petition for Writ of Habeas Corpus." Section III, subsection [G] of our brief addressed Washington's *Lockett* challenges to our sentencing statutes and to jury instruction C-20. (Appendix 7 at A-106)

In a short but succinct presentation, we argued that because C-20 was not objected to at trial, *Wainwright v. Sykes* precluded habeas relief on this ground. (Appendix 7 at A-108)

The United States Magistrate, to whom this case was initially referred, reported on September 24, 1979, that

Washington's constitutional claims were without merit but, nevertheless, recommended that because of the death sentence the court should grant an evidentiary hearing on the claim of ineffective assistance of counsel.[3] In its thirty-eight (38) page Report and Recommendation the Magistrate addressed the *Sykes* claim with specific rhetoric. (Appendix 4 at A-83) He observed that "[u]nder Mississippi law, objections to instructions are waived unless raised at trial." [Mississippi citations omitted] He further observed that "[p]etitioner's failure to object to the instruction at trial accordingly would appear to preclude consideration of this claim by plaintiff for habeas relief [5th Circuit Court of Appeals citation omitted], but assuming *arguendo* that it does not, the instruction did not deprive petitioner of a fundamentally fair trial." (Appendix 4 at A-84)

In the wake of the federal evidentiary hearing, the district judge, on December 19, 1979, issued its seventeen (17) page memorandum opinion. Chief Judge Keady observed that ". . . this [C-20] instruction was not objected to at trial, and under it the jury was free to consider all mitigating evidence which petitioner saw fit to offer." (Appendix 3 at A-82)

In the United States Court of Appeals for the Fifth Circuit, our first responding argument to Washington's belated *Lockett* claim was premised on the rule in *Sykes*. Nevertheless, the Court of Appeals, Circuit Judge Randall writing for the two judge majority, held as a matter of law that ". . . the *Sykes* rule is inapplicable to Washington's *Lockett* claim despite his trial counsel's failure to object to the relevant jury instructions." (Appendix 1 at A-51)

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3. This hearing was conducted before Chief Judge Keady on November 9, 1979.

The Court found "two flaws" in the *Sykes* argument advanced by Commissioner Watkins. *First*, ". . . the State did not contend in the district court that Washington's *Lockett* claim [was] barred by Mississippi's contemporaneous objection rule and *Sykes* [and] [a]s such, the State itself [was] precluded from raising at this late date any claim that Washington should be barred under a state-law theory of procedural default. . ." (Appendix 1 at A-51) *Second* ". . . the Mississippi Supreme Court expressly addressed the merits of Washington's *Lockett* claim in his direct appeal, rather than applying a contemporaneous objection rule to bar consideration of the merits." (Appendix 1 at A-51) The Court of Appeals thereafter decided the merits of Washington's challenge to C-20. In articulating the standard by which state court trial instructions are judged on federal habeas corpus, the Court of Appeals opined ". . . that a reasonable juror might well have been led to believe from the trial court's charge that in determining whether the aggravating factors sufficiently outweighed the mitigating factors so as to warrant the imposition of the death penalty, it was his sworn duty to consider *only* the two mitigating factors specifically enumerated in the charge." (Appendix 1 at A-56, 57)

In adjudicating the applicability of *Lockett* to the instruction given in Washington's case, the Court of Appeals held ". . . that the challenged jury instructions prevented the sentencer's consideration of nonstatutory mitigating factors in essentially the same manner as did the Ohio statute struck down by the *Lockett* court." (Appendix 1 at A-62)

Accordingly, the Court of Appeals concluded ". . . that under *Lockett*, the error in the trial court's proscription of jury consideration of nonstatutory mitigating circumstances was one of constitutional proportions that violated

rights secured to Washington under the Eighth and Fourteenth Amendments. . ." (Appendix 1 at A-69)

Petitioner Watkins seeks certiorari to review the two *Sykes*-related findings made by the Court of Appeals as well as the conclusions reached by that Court following federal scrutiny of the *Lockett* issue.

VI. REASONS FOR GRANTING THE WRIT

Certiorari should be granted in this cause because it affords this Court an opportunity to amplify upon *Lockett* precedent. In Washington's case mitigating circumstances were fairly defined, competent defense counsel introduced his mitigating evidence without prosecutorial objection, and trial counsel was allowed to argue anything and everything he considered important or mitigating. The jury was specifically instructed that it must objectively consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. This should be constitutionally sufficient under the Eighth and Fourteenth Amendments.

The Court of Appeals is not the final authority on the interpretation which a Mississippi jury could have given the C-20 instruction. In our view the Court stopped short of the totality analysis required by *Sandstrom v. Montana,* 442 U.S. 510 (1979); *Henderson v. Kibbe,* 431 U.S. 145 (1977); and *Cupp v. Naughten,* 414 U.S. 141 (1973). As a result, it erroneously found *Lockett* error and erroneously concluded that the sentencing proceedings were drained of fundamental fairness.

In addition there appears to be some genuine debate in the Fifth Circuit Court of Appeals as to the actual scope of the holding in Washington's case. The majority opined:

> Finally, it bears emphasis that we do not here decide whether constitutional error would inhere in a trial court's failure specifically to instruct the jury in a capital case that it was free to consider nonstatutory mitigating factors;[60] our holding is limited to the circumstances of the case at bar, in which the trial court's charge was not silent on the issue, but operated affirmatively to preclude jury consideration of nonstatutory mitigating factors.[61] 655 F.2d at p. 1377 [notes 60 and 61 omitted]

But see Circuit Judge Fay's special concurrence in *Spivey v. Zant*, 661 F.2d 464 (5 Cir. Nov. 16, 1981). We quote:

> Judge Tjoflat accurately sets forth the opinions of the Supreme Court of the United States dealing with state statutes allowing the death penalty and appropriate consideration of mitigating circumstances. *Lockett* and *Bell*, along with our opinion in *Chenault*, require instructions which do not preclude consideration of mitigating factors and which allow objective consideration of the particularized circumstances of the individual offense and the individual offender. In my opinion, however, this does not require the trial judge to specifically list each and every conceivable mitigating circumstance that counsel may suggest either during trial or on appeal. *But, we are bound by Washington v. Watkins, 655 F.2d 1346 (5th Cir. 1981), unless and until it is altered by the en banc court.* * * * 661 F.2d at p. 479 [emphasis ours]

What do the Eighth and Fourteenth Amendments require with respect to "specificity" in state sentencing instructions on mitigation? Certiorari should be granted in order to provide clear guidance to the States in this delicate area of constitutional law.

VII. ARGUMENT

A.

The Decision of the Court of Appeals Declining to Apply the Rule in *Wainwright v. Sykes* Is in Conflict With *Sykes* Itself.

Despite trial counsel's failure to object at trial to sentencing instruction C-20,[4] the Court of Appeals declined to apply the rule in *Wainwright v. Sykes*, 433 U.S. 72 (1977). The Court found two fatal flaws in the *Sykes* argument advanced in our appellate brief. The first, we submit, was the product of an erroneous factual finding, and the second flowed in the wake of a presupposition non-predicable upon the basic, historical facts of this case.

First, the majority's conclusion that ". . . the State itself is precluded from raising at this late date any claim that Washington should be barred under state-law theory of procedural default . . ." [655 F.2d at p. 1368], was a product of an erroneous factual finding. The majority found that ". . . the State did not contend in the district court that Washington's *Lockett* claim is barred by Mississippi's

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4. During the federal evidentiary hearing, trial counsel Reeves was asked if he felt instruction C-20 covered the applicable law. He replied, "It did." [E.H. 159] During questioning by Washington's counsel, Reeves testified that his "plan at [the sentencing] stage for mitigation" was "[t]o put Johnny on, let him testify about his age, his, the fact that he had a young child. Basically those were the two mitigating things." [E.H. 121] Counsel acknowledged at our hearing that he did not feel that he was limited by statute in his introduction of mitigating evidence. He testified that "[w]hatever we put on I felt would be admitted . . . I don't think the judge would have dared put a limit on it because of the possibility of reversal." [E.H. 121] Reeves did not object to the C-20 charge because he ". . . had already gotten [the mitigating evidence] in and it was not in the statute." [E.H. 122] He felt the jury would consider it because he did not ". . . think the jury can forget it once they hear it, even if they are instructed to disregard it." [E.H. 122]

contemporaneous objection rule and *Sykes*." [655 F.2d at p. 1368] This is an unfair assessment because not only did we file a lengthy memorandum inviting, in brief but succinct language, the district court's attention to Mississippi's contemporaneous objection rule and *Sykes* (Appendix 7 at A-106), the United States Magistrate, to whom this case was referred, addressed with specific rhetoric our claim that *Sykes* barred consideration of Washington's challenge to instruction C-20. (Appendix 4 at A-83)

In his Report and Recommendation, the United States Magistrate, at the conclusion of his *Sykes* determination, proceeded alternatively to address the merits of Washington's challenge to C-20. (Appendix 4 at A-84) The district judge, on the other hand, apparently declined the invitation to apply the *Sykes* rule. He simply observed ". . . this [C-20] instruction was not objected to at trial, and under it the jury was free to consider all mitigating evidence which petitioner saw fit to offer." (Appendix 3 at A-82)

In the Court of Appeals, our first responding argument to the *Lockett* C-20 challenge was drawn from *Sykes*. [655 F.2d at p. 1368] The Mississippi cases cited and relied upon in that Court, save for *Warren v. State* [citation omitted], are the same cases we brought to the attention of the district court. [655 F.2d at p. 1368, note 40] Accordingly, the majority's conclusion that respondents, for want of timely presentation, are ". . . precluded from raising at this late date. . ." a *Sykes* claim predicated upon procedural default in the state trial court is simply a product of an erroneous factual finding.

Second, the majority's conclusion that the Supreme Court of Mississippi ". . . expressly addressed the merits of Washington's *Lockett* claim . . . rather than applying a contemporaneous objection rule to bar consideration of the

merits" [655 F.2d at p. 1368] is manifestly wrong because Washington has never presented to the Supreme Court of Mississippi a *Lockett* claim targeted at the viability of jury instruction C-20. In short, our Court had neither *Lockett* "merits" to address nor *Lockett* "merits" to which its contemporaneous objection rule could be applied.[5]

In reciting the historical facts, the Court of Appeals opined, ". . . the [Supreme Court of Mississippi] 'rejected' Washington's contention that his sentence was imposed in violation of *Lockett v. Ohio* [citation omitted]." We respectfully submit, however, Washington advanced no *Lockett* claim for our Court to "reject." In addressing the merits of Washington's C-20 claim, the Court of Appeals observed in note 53 that on direct appeal ". . . the Mississippi Supreme Court apparently 'treated' Washington's *Lockett* arguments as a challenge both to the statute and to the jury instructions in his case. * * * [The Court] . . . *did not directly 'rebut' Washington's argument that the jury instructions in his case had precluded the jury's consideration of nonstatutory mitigating factors.*" [655 F.2d at p. 1373; emphasis ours] We respectfully submit, for reasons more fully developed in subsequent discussion, Washington advanced no *Lockett* arguments for our Court to either "treat" or "rebut" on direct appeal.[6]

Given the validity of our own observations, on what basis, we ask, could our reviewing Court have applied a

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5. Rule 6(b), Miss. Sup. Ct. Rules (1976), states: "No error not distinctly assigned shall be argued by counsel, except upon request of the Court, but the Court may, at its option, notice a plain error not assigned or distinctly specified." Errors assigned but not argued are waived and will not be considered. *Ramseur v. State*, 368 So.2d 842 (Miss. 1979); *Bennett v. State*, 211 So.2d 520 (Miss. 1968); *Hassell v. State*, 92 So.2d 194 (Miss. 1957).

6. To this day, the Supreme Court of Mississippi has never had a fair opportunity to address, either on direct appeal or in a state post-conviction context, the merits of Washington's belated *Lockett* challenge to instruction C-20.

contemporaneous objection rule? At the time the Supreme Court of Mississippi decided Washington's case on direct appeal, a *Lockett* challenge to C-20 was not even in the pre-embryonic stages of development; rather, the idea that a jury instruction emanating from the lips and pen of the trial judge inflicted upon Washington the same fatal trauma that the Ohio statute inflicted upon Sandra Lockett was an amorphous issue incapable of detection in the wake of direct appeal in state court. Consequently, the Supreme Court of Mississippi could not, as the Court of Appeals suggested, have adjudicated Washington's *Lockett* issue on the merits.

Washington, by and through Reeves, his state trial counsel, filed his appellate brief in the State Supreme Court on December 12, 1977. Two errors, and two only, were assigned. *SEE*: *Washington v. State*, 361 So.2d at p. 61 (Appendix 5 at A-95) Washington's case was argued orally on May 9, 1978. On July 3, 1978, the United States Supreme Court decided *Lockett v. Ohio*. One week post-*Lockett*—July 12, 1978—our Court decided Washington's appeal. While it did not have before it for consideration any *Lockett* claim to either "address", "reject", or "treat", or "rebut", our Court, at the conclusion of its written opinion, elected to distinguish *Lockett*. It did so, however, purely in a statutory context. The Court noted that "*Lockett* bears no resemblance to *Washington*" because Section 99-19-101 states, *inter alia*, ". . . evidence may be presented as to *any matter that the court deems relevant to sentence*, and shall include matters relating to *any of the aggravating or mitigating circumstances.*" 361 So.2d at pp. 67-68 (Appendix 5 at A-101) The Court of Appeals correctly observed in note 53 [655 F.2d at p. 1373] that our Court interpreted this portion of our statute to mean that "the only limitation placed [by our statute] on the intro-

duction of evidence of mitigating circumstances is that it must be *reasonably relevant.*" 361 So.2d at p. 68 (Appendix 5 at A-101)

Obviously, the Supreme Court of Mississippi was simply reinforcing in a statutory context its prior holding in *Jackson v. State,* 337 So.2d 1242 (Miss. 1976), and elected to distinguish *Lockett, sua sponte,* for the purpose of adding to the integrity of Mississippi's new statutory scheme. The Court, however, was neither called upon nor given fair opportunity to address the legal sufficiency of Instruction C-20 in a *Lockett* or any other context. This question has never been presented to it for appellate scrutiny.

Admittedly, the Court penned the entire text of C-20 in reciting the historical facts of Washington's case.[7] Admittedly, the Court observed that C-20 was given "[i]n strict compliance with the provisions of Section 99-19-101 . . ." 361 So.2d at p. 64 (Appendix 5 at A-92) Nevertheless, it did not, as the Court of Appeals concluded, "treat . . . Washington's *Lockett* arguments as a challenge both to the statute and to the jury instructions in his case." [655 F.2d at p. 1373, note 53] This cannot be so when Washington had no *Lockett* arguments before the Court challenging either the statute[8] or Instruction C-20.

A federal court of appeals will decline to address a *Sykes* claim if such is not made in district court. In like manner, the Supreme Court of Mississippi will forsake application of its contemporaneous objection rule to bar con-

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7. *Washington* is not the only death penalty case in which our Court has referred to the content of substantive sentencing instructions even though their legal sufficiency was not controverted. *SEE: Gray v. State,* 375 So.2d 994, 1003-04 (Miss. 1979).

8. Washington's statutory challenge on direct appeal, of course, addressed the question of vagueness in the "especially heinous" aggravating factor.

sideration of a federal claim when that claim is not fairly before them.

Moreover, a procedural rule of our Court admonishes members of the Mississippi bar that an appellate challenge to the legal integrity of a jury instruction will not be considered in the absence of an objection below.[9]

In our view, Washington's case exists in the following posture. Contrary to the finding of the Court of Appeals, the State indeed advanced a *Sykes* claim in the district court. Contrary to the conclusion of the Court of Appeals, the Supreme Court of Mississippi failed to address the merits of Washington's amorphous federal claim. While it is true our Court did not apply its contemporanous objection rule to bar consideration of the merits of a *Lockett* claim, this is obviously because of an absence of "merits" on direct appeal to either bar or consider. Stated differently, there was simply no reason to do so.

Is the *Sykes* rule, we ask, inapplicable under these circumstances? We think not. It does not appear in *Sykes* itself that the Florida appellate courts relied upon and applied its contemporaneous objection rule; rather, this Court observed that

> [s]ince all of the Florida appellate courts refused to review petitioner's federal claim on the merits after his trial, and *since their action in so doing is quite consistent with a line of Florida authorities inter-*

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9. Rule 42, Miss. Sup. Ct. Rules (1976), states, *inter alia*, that "[i]t is therefore the rule of this Court that no assignment of error based on the giving of an instruction to the jury will be considered on appeal unless specific objection was made to the instruction in the trial court stating the particular ground or grounds for such objection." Only the Supreme Court of Mississippi can waive the requirements of this rule and then only to prevent manifest injustice. *Clark v. State*, 260 So.2d 445 (Miss. 1972).

> *preting the rule in question as requiring a contemporaneous objection,* we accept the State's position on this point. 433 U.S. at pp. 85-86 [emphasis ours]

It is clear the error, if any, complained of in federal court was not preserved for review on direct appeal to the Supreme Court of Mississippi because trial counsel was given the opportunity to object to the charge and declined to do so.[10] Where such has occurred, our State Supreme Court has consistently declined review. *Berryhill v. Byrd,* 384 So.2d 1026 (Miss. 1980); *Depriest v. State,* 377 So.2d 615 (Miss. 1979); *Collins v. State,* 368 So.2d 212 (Miss. 1979); *Entrican v. State,* 309 So.2d 851 (Miss. 1975).

It is true that the Court of Appeals, citing and quoting from *County Court of Ulster County v. Allen,* 442 U.S. 140, 154 (1979), observed that "[i]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." Nevertheless, in *Ulster* the New York

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10. THE COURT:

Any objection by the State to Instruction—any objection by the defendant to Instruction S-6?

MR. REEVES:

No sir.

THE COURT:

Any objection by the defendant to Instruction C-20?

MR. REEVES:

No sir.

THE COURT:

Any objection by the State to Instruction C-20?

MR. HOWARD:

No, your Honor.

THE COURT:

Being no objection, both of them will be given. [State Trial Record: Vol. II, at p. 315]

trial court "ruled on the merits when it denied respondent's motion to set aside the verdict" and "the [New York] Appellate Division's unexplained affirmance [was] that that court accepted not only the judgment but also the reasoning of the trial court." 442 U.S. at p. 152. Moreover, the New York Court of Appeals did not ignore the constitutional claim in its opinion but summarily rejected the claim on its merits. 442 U.S. at p. 152.

The Supreme Court of Mississippi, on the other hand, has never had a fair opportunity to address the merits of Washington's *Lockett* challenge to C-20. Post-conviction and collateral redress was sought in state court on May 23, 1979. In his petition for coram nobis relief presented to the State Supreme Court, Washington alleged in subsection III. 5 that "[a]s applied in this case Section 99-19-101 limited the jury's consideration of mitigating circumstances." There is absolutely no reference, either directly or indirectly, to sentencing instruction C-20 in Washington's four (4) page post-conviction petition or the fifteen (15) page memorandum of law submitted to our Court in support of the petition.[11] Washington clearly launched a statutory challenge. In state court the target of his post-conviction *Lockett* claim was a *state statute*, not jury instruction C-20.[12]

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11. Rule 38 of the Rules of the Supreme Court of Mississippi (1976), prescribes the procedure for application for leave to file in the lower courts a Petition for Writ of Error Coram Nobis under Mississippi Code Annotated § 99-35-145 (1972).

12. Nor was a challenge to C-20 maintained in Washington's original Petition For Writ of Habeas Corpus filed in the district court on May 24, 1979. This issue was not clearly defined until May 25th when post-conviction counsel addressed the legal sufficiency of C-20 during argument in district court on Washington's motion to stay his execution pending the consideration of the allegations in his federal habeas petition. In his "First Supplemental Memorandum" filed on June 7, 1979, Washington, by post-facto metamorphosis, changed the form of the statutory

(Continued on following page)

Obviously, our Court had decided on direct appeal that § 99-19-101 did not unconstitutionally limit the introduction of relevant mitigating factors and on May 25, 1979, it summarily denied, without opinion, Washington's application for leave to file in the court below his petition for coram nobis relief. Consequently, it has never adjudicated Washington's *Lockett* challenge to C-20 on its merits nor has it been afforded a fair opportunity to do so.

An adjudication on the merits by the state court of a federal constitutional claim or, at the very least, a fair opportunity to adjudicate the federal claim on its merits is an indispensable requisite or condition—a *sine qua non*, if you please—to a finding by the Court of Appeals that the *Sykes* rule, timely presented to the district court, is inapplicable even though trial counsel failed to object at trial to relevant jury instructions and wholly failed to raise the question either on direct appeal or in a state post-conviction context.

Admittedly, *Lockett* postdated Washington's trial by approximately thirteen (13) months and his state appellate brief by eight (8) months. In this posture he certainly could not have advanced, either at trial or on appeal, a bona fide *Lockett* claim to instruction C-20. Nevertheless, trial counsel was well aware at the time of Washington's pre-*Lockett* trial that Mississippi law placed no limitation on the introduction of mitigating circumstances. The Supreme Court of Mississippi had made this very clear in *Jackson v. State*, 337 So.2d 1242, 1256 (Miss. October 5, 1976), and trial counsel was aware of the *Jackson* decision.

Footnote continued—

challenge, suggesting that "[t]his issue raises the fact that the statute on its face limits the 'mitigating factors' that a capitally charged person may prove and argue *and likewise that the Court's instruction C-20 limited 'mitigating factors' that were presented by the defendant.* * * *" [Emphasis supplied]

[E.H. 138] And, as noted previously, trial counsel felt that "[w]hatever we put on . . . would be admitted . . . the judge would [not] have dared put a limit on it because of the possibility of reversal." Consequently, trial counsel could have indeed raised a *Lockett*-related challenge both at trial and on appeal had he felt that C-20 precluded the sentencer's consideration of relevant mitigating factors.

Moreover, it is clear that Washington's quest for state post-conviction redress was filed on May 23, 1979, nine (9) months post-*Lockett*. Certainly substitute counsel had ample opportunity to fully develop a *Lockett* claim to C-20 and present it in a fair manner to the Supreme Court of Mississippi. Washington did not do that here.

Nonetheless, any reasons advanced for trial counsel's failure to object is relevant only to the extent that such constitutes "cause" within the contours of *Sykes*. The Court of Appeals, however, declined our invitation to address the requirement of cause. [655 F.2d at p. 1368, note 41]

We respectfully submit that the Court of Appeals erred in declining to adjudicate the subsidiary issues of "cause" and "prejudice." Inquiry here, in our view, is necessary to fully and fairly adjudicate the question of forfeiture in the wake of a total bypass of state remedies. Such had its inception at trial, flowed through direct appeal, and culminated with Washington's failure, during his quest for post-conviction relief, to fairly present the *Lockett* argument to the Supreme Court of Mississippi so as to have afforded it the "first opportunity to apply controlling legal principles to the facts bearing upon [Washington's] constitutional claim." *Picard v. Connor*, 404 U.S. 270, 275-277 (1971).

B.

The Decision of the Court of Appeals Is at Odds With Prior Decisions of This Court Because, on the Facts of This Case and in Light of the Totality of the Circumstances, the Granting of Sentencing Instruction C-20 Neither Operated to Preclude From the Sentencer's Consideration Nonstatutory Mitigating Factors nor Did It So Infect the Sentencing Proceedings As to Drain Them of Fundamental Fairness.

Neither the United States Magistrate nor the Chief District Judge for the Northern District of Mississippi reached the conclusion that sentencing instruction C-20 (Appendix 6 at A-103) was inconsistent with *Lockett v. Ohio*, 438 U.S. 586 (1978). Neither did the Chief Judge for the United States Court of Appeals. [655 F.2d at pp. 1378-79] Nevertheless, the two judge majority for the Court of Appeals held that the process by which the State of Mississippi secured a sentence of death was constitutionally flawed because the sentencing jury was precluded from considering nonstatutory mitigating factors in violation of this Court's holding in *Lockett v. Ohio, supra.*

More specifically, the Court of Appeals concluded that because a reasonable juror "might well have been" led to believe from the trial court's sentencing instruction C-20 that in determining whether the aggravating factors sufficiently outweighed the mitigating factors so as to warrant imposition of the death penalty, it was his sworn duty to consider *only* the two mitigating factors specifically enumerated in the charge [655 F.2d at p. 1371], the error in the trial court's proscription was one of constitutional proportions that unquestionably so infected the sentencing proceedings as to drain them of fundamental fairness. [655 F.2d at p. 1376] It is our position that the Court of Appeals stopped short of the totality analysis required by *Sandstrom*

v. Montana, 442 U.S. 510 (1979); *Henderson v. Kibbe*, 431 U.S. 145 (1977); and *Cupp v. Naughten*, 414 U.S. 141 (1973). Further explication follows.

In *Lockett v. Ohio, supra*, a state statute patently and potently precluded the sentencer, a state trial judge, from considering as mitigating factors, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffered as a basis for a sentence less than death. In *Eddings v. Oklahoma*, 50 LW 4161 (January 19, 1982), the sentencer, a state trial judge, refused to consider, as a matter of law, certain relevant mitigating evidence. Speaking for the *Eddings'* plurality Justice Powell observed, "[i]n this instance it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf."[13]

The preclusion in *Lockett* and *Eddings* is qualitatively different from the purported preclusion in *Washington*. The Ohio statute addressed in *Lockett* totally prevented and precluded the sentencer from considering relevant mitigating factors. Accordingly, there was a substantial "risk" that the death penalty would be imposed in spite of factors which might call for a less severe penalty. In *Eddings* the sentencer excluded certain mitigating factors because he found as a matter of law that he was unable to consider them. Once again, this state of affairs created an unreasonable risk. *Washington*, on the other hand, is not a case where the trial judge, as a matter of law, instructed the jury to disregard the evidence. It is a case where, at best, the instruction was not as complete as it could have been. Nevertheless, the jury was free to consider any nonstatutory factors. Given the totality of the circumstances, the risk that the death penalty was

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13. *Eddings*, of course, was decided almost two months after the Court of Appeals decided *Washington*.

imposed by the jury sans due consideration of nonstatutory factors hangs innocuously from an invisible and nonexistent web.

It is petitioners' position, *first* of all, that the analysis made by the Court of Appeals fell short of the totality approach required by prior decisions of this Tribunal. Consequently, the Court erroneously reached the conclusion ". . . that the challenged jury instructions prevented the sentencer's consideration of nonstatutory factors in essentially the same manner as did the Ohio statute struck down by the *Lockett* court." [655 F.2d at p. 1373] We contend this cause is devoid of *Lockett* error and that the sentencing proceedings in Washington's case were not inconsistent with that decision.

Second, we argue that any shortcomings found by the Court of Appeals in the C-20 charge did not, in light of the totality of the circumstances, so infect the sentencing proceedings as to drain them of fundamental fairness.

It has never been suggested by Commissioner Watkins that a jury instruction emanating from the lips and pen of the trial court at the close of the sentence-determining phase of a death penalty case is incapable of inflicting the same fatal trauma the Ohio statute inflicted in *Lockett*. [655 F.2d at p. 1374, note 55] We fully concur with the Court of Appeals ". . . there is no doubt but that Washington may properly raise his *Lockett* argument through a challenge to the instructions given by the trial court to the jury that convicted him." [655 F.2d at p. 1374] Nor do we take issue with the "reasonable juror" standard utilized by the Court of Appeals to evaluate, in a federal habeas corpus environment, a sentencing instruction given by a state trial court. [655 F.2d at p. 1369]

Rather, we contend that the Court of Appeals erred in its determination of the practical effect that C-20 could

have had in Washington's case. The Court of Appeals, who is not the final authority on the interpretation which a jury could have given the instruction [*Sandstrom v. Montana*, 442 U.S. at pp. 516-17], engaged in a bit by bit parsing of the charge and judged it in artificial isolation rather than viewing the instruction in the context of the overall charge and in a totality environment.

Cupp v. Naughten, 414 U.S. 141, 146-47 (1973), teaches us that

> a single instruction to a jury may not be judged in artificial isolation, but must be viewed in the context of the overall charge. Boyd v. United States, 271 U.S. 104, 107, 70 L.Ed. 857, 46 S.Ct. 442 (1926). While this does not mean that an instruction by itself may never rise to the level of constitutional error, see Cool v. United States, 409 U.S. 100, 34 L.Ed.2d 335, 93 S.Ct. 354 (1972), it does recognize that a judgment of conviction is commonly the culmination of a trial which includes testimony of witnesses, argument of counsel, receipt of exhibits in evidence, and instruction of the jury by the judge. Thus not only is the challenged instruction but one of many such instructions, but the process of instruction itself is but one of several components of the trial which may result in the judgment of conviction. 414 U.S. at pp. 146-47.

What is perfectly clear from *Lockett* and *Eddings* is that the sentencing authority in a capital case must not be "precluded" or "prevented" from considering relevant mitigating facets of the defendant's character and record and the circumstances of the particular offense. In Washington's case, the trial court's C-20 instruction could not have "precluded" or "prevented", or even discouraged or impinged upon in some tangential respect, a reasonable juror's consideration of mitigating factors that were placed

squarely before them. This charge, when taken as a whole and sensibly considered in light of the totality of the circumstances, presented the issues and the law to the sentencer in a fair and constitutionally acceptable manner. Stated differently, a reasonably prudent juror would have been aware of what he or she could consider in determining the question of life or death. We say this for a number of reasons.

Looking at the charge itself, we note, *first* of all, that it defined mitigating cricumstances as "those which tend to warrant the less severe penalty."

Second, nowhere in the trial court's charge is there any language that expressly informed the sentencer that its consideration of mitigating factors was limited solely to the two statutory mitigating circumstances identified in the instruction. Such was the obvious vice of Ohio's statutory scheme which permitted the state sentencing judge to hear certain mitigating evidence but powerfully prevented the Court, except to the extent the evidence had a bearing on three statutory factors, from considering that evidence as a basis for a sentence less than death.

Third, the omission of the word "only" from the portion of the charge addressing mitigating factors would have lead a reasonably prudent juror to conclude that his consideration of mitigating circumstances was not, in the manner of the aggravating circumstances, limited to those specified in writing by the court. A reasonably attentive juror adjudicating the question of life or death indeed would have recognized this one word distinction. To suggest otherwise is to suggest that the twelve jurors in Washington's case could not, and did not, read the instructions of the court.

Fourth, C-20, at the very outset, informed the sentencer that not only was it permitted to consider certain

facts in mitigation of the sentence, the jury "must . . . consider the detailed circumstances of the offense of which the defendant was convicted *and the defendant himself.*" Obviously this language did not operate to "preclude" or "prevent" consideration of ". . . any aspect of the defendant's character or record and any of the circumstances of the offense . . . proffer[ed] as a basis for a sentence less than death."

Turning now to other aspects of the totality picture, we note, *fifth,* the trial court prefaced the reading of the C-20 charge with certain comments and supplemental instruction. We quote:

> "Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and *you have heard evidence in mitigation put on by the defendant.* You must in your sentencing find at least one item present of aggravation before you could impose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then *you must consider any evidence in mitigation.* And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty. If you found no elements of aggravation listed on the instruction I am about to give you, of course, you could not return the death penalty, but you would have to return a life imprisonment. If you found aggravation and mitigation and were unable to agree on the punishment, then you could return a verdict in open court that you are unable to agree on the punishment in which event the court would sentence the defendant to life imprisonment." [Emphasis ours]

Clearly, the jury's attention was invited by the court, as well as by trial counsel, to the evidence "heard" in mit-

igation at the sentencing phase. A reasonable juror could reach no conclusion other than he was entitled to consider it. If this is not true, then why had he heard it, and why had he been invited by the court to weigh it?

Sixth, Washington's testimony at the sentencing phase was placed squarely before the jury sans a single state objection. (Appendix 8 at A-109) Although instruction C-20 did not specifically invite the jury's attention to any articulable non-statutory mitigating factors, trial counsel's closing oratory, likewise voiced without prosecutorial objection, clearly did.[14] We submit this argument by counsel, coupled with the court's reference to evidence "heard" in mitigation, is a highly significant point underpinning our position that scrutiny of the C-20 charge, as a whole *and in a totality environment,* leads to the inevitable and sensible conclusion that a reasonable juror could not have been misled.

Seventh, competent defense counsel was specifically asked by the trial judge if he had any objection to instruction C-20. He replied he did not. At our evidentiary hearing in federal district court, trial counsel was asked if he felt the instruction covered the applicable law. He replied, "It did." Reeves also testified at this hearing that he was not limited in his introduction of mitigating circumstances and felt "[w]hatever we put on . . . would be admitted."

Eighth, C-20 was not given until after the jury had heard every single word proffered as a basis for a sentence

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14. "[L]adies and gentlemen of the jury, I stand here before you now with a very heavy burden and that is to plead, beg for the life of this young man. *You have heard the evidence that was presented.* I am not going to comment any more about it. * * * You have got to make the decision as to whether this twenty-three-year-old boy with a young child dies or whether or not he will be imprisoned for the rest of his life." [Emphasis supplied]

less than death. (Appendix 8 at A-109) Not one whit of information was excluded or even objected to.[15] There was no question but that everybody—including the jurors who, by law, were required to be 21 years of age or older and able to both read and write—was well aware of what could and could not be considered.

Ninth, the legal sufficiency of C-20 was not raised on direct appeal or in a state post-conviction context. This issue was not fully defined until substitute counsel—of which there have indeed been several—presented this matter to the district court on a motion to stay execution pending disposition of the habeas petition. Such, we contend, simply detracts from the viability of the C-20 complaint.

Tenth, in *Lockett* the sentencer was a single judge who could not, and clearly did not, consider highly relevant factors in mitigation of the defendant's sentence. He was "precluded" and "prevented" from considering relevant mitigating factors.[16]

Eleventh, the trial judge certainly could not have intended to limit, to the total exclusion of nonstatutory factors, the jury's consideration of mitigating circum-

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15. In *Sandstrom v. Montana*, 442 U.S. 510 (1979), cited by the Court of Appeals, there was a specific and contemporaneous objection to the instruction in question. Consequently, there was at least some genuine debate at trial over the integrity of an instruction that invited the factfinder into the thorny thicket of mandatory legal presumptions.

16. The trial judge in *Lockett* said that he had "no alternative, whether [he] like[d] the law o. not" but to impose the death penalty. *Id.*, 438 U.S. at p. 594. It is obvious the Ohio statute suffered from the precise legal infirmity that *Lockett* to this day proscribes—potent preclusion of consideration of relevant mitigating factors heard by the court in mitigation of Lockett's sentence but entirely forsaken in that context. Similarly, in *Eddings* the trial judge stated that "in following the law," he could not "consider the fact of this young man's violent background." In both *Lockett* and *Eddings*, preclusion is loud and clear; in *Washington* it is not.

stances. Indeed, had he wanted to do so, the mitigating factors would have been circumscribed by use of the word "only" in the same manner the aggravating circumstances were circumscribed. We think it clear that everyone—including competent defense counsel—understood the instruction and that the issue of mitigation was fairly presented.

In Washington's case the Court of Appeals concluded that because a reasonable juror "might well have been" led to believe it was his duty to consider only the two statutory factors [655 F.2d at pp. 1370-71], the sentencer was "prevented" and "precluded" by C-20 from considering nonstatutory factors in violation of *Lockett*. [655 F.2d at p. 1373] In our view, the "might well have been led" in *Washington* is simply not the constitutional equivalent of patent "preclusion" in *Lockett*.

Nevertheless, scrutiny of the instruction as a whole and consideration of the charge in a totality environment can only lead to the reasonable conclusion that Washington's jury was not restricted in a *Lockett* sense but was free to give "independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation . . ." [*Lockett*, 438 U.S. at p. 605]

We respectfully submit that Washington's jury, much like the jury in *Cupp v. Naughten* was free to both collectively "consider" and "reject" that testimony which was before it. With deference to the Court of Appeals, it is petitioners' considered opinion that the Court erred in eschewing a bona fide totality approach to the question of whether a reasonable juror could have been misled with respect to what he could and could not consider in mitigation. Construed in a light most favorable to Washington, the effect of the unobjected to charge is, at best,

simply too murky to warrant the conclusion reached by the majority.

Commissioner Watkins further contends that any deficiencies or shortcomings in sentencing instruction C-20 did not render the sentencing phase unconstitutional by "so infect[ing] the sentencing proceedings as to drain them of fundamental fairness." [655 F.2d at p. 1376] "An omission, or an *incomplete instruction,* is less likely to be prejudicial than a misstatement of the law." *Henderson v. Kibbe,* 431 U.S. 145, 155 (1977) [emphasis ours] It was not necessary, we argue, for the trial judge to make more clear that which was clear enough.

The mere possibility, if any at all, that the jury, as laymen, may have misunderstood what they could or could not consider is not, *ipso facto,* a defect of constitutional proportions. This is especially true where, as here, supplementary instruction, arguments of counsel, the proffering of evidence without prosecutorial objection, and other totality factors make it reasonably, if not perfectly, clear that the jury was not misled. In short, we do not think that scrutiny in a totality context discloses any legitimate basis for finding ambiguity concerning the factors actually considered by the jury. If there is a risk, it is not a substantial risk; rather, it is a constitutionally acceptable one in Washington's case.

In advancing this contention we are not unmindful of the type of extenuating evidence proffered which the Court of Appeals concluded "might rationally" have been mitigating. [655 F.2d at p. 1375] We concur with the Court of Appeals that the sentencer is the proper authority for determining the "weight" to be afforded relevant mitigating factors. Clearly that task will not be performed by this Court. *Eddings v. Oklahoma, supra.*

While we argued in the Court of Appeals that the nonstatutory mitigating factors proffered by Washington were not "reasonably likely" to generate any sympathetic consideration from the sentencing authority, we did not intend to suggest that these matters were inadmissible for consideration in a mitigating context or even that a jury could not possibly have found them mitigating. The point we attempted to make—and, admittedly, we presented the matter rather poorly—was that resolution of the due process inquiry, as well as any Eighth and Fourteenth Amendment concerns, should turn in the wake of a totality inquiry. The probative potential of the testimony purportedly excluded from consideration is a part, we submit, of that totality.

It may indeed be the law—but we hope it is not—that any and everything focusing upon the defendant's character and record and the circumstances of the offense cannot be precluded from the sentencer's consideration lest it offend against the Constitution. While this Court will not weigh the mitigating evidence, we respectfully submit it is permitted to assess its probative potential in order to determine, in a totality context, whether or not a death penalty defendant has been denied fundamental fairness at his sentencing hearing.

We opine that the Court of Appeals failed to compare, qualitatively, the nonstatutory factors not directly alluded to by the C-20 charge, with those factors potently excluded from the sentencer's consideration in *Lockett*, *Green v. Georgia*, 442 U.S. 95 (1979), and *Eddings*. The Court of Appeals completely overpainted the picture of mitigation portrayed by Washington's testimony. [655 F.2d at pp. 1375-76] The trial record reflects only that Washington had been living for two years with a woman not his wife and that their three-year-old daughter—fathered by Wash-

ington out of wedlock—lived with him and the child's mother. The record is totally devoid of anything more or anything less with respect to his paternal responsibilities. (Appendix 8 at A-109) Testimony divulging Washington's employment history was proffered, not by the defendant, but by the State during cross-examination. (Appendix 8 at A-111, 112)

In summary, the Court of Appeals stopped short of the required totality analysis in reaching its legal conclusions. Because there was no substantial risk that Washington's sentencing jury felt constrained to limit its consideration of mitigating factors, and because the extenuating testimony purportedly precluded from the sentencer's consideration was not particularly compelling, the Court of Appeals mistakenly found *Lockett* error and mistakenly concluded that the sentencing proceedings were drained of fundamental fairness.

VIII. CONCLUSION

The basis for the infliction of the death penalty is as clear as the noonday sun. Washington entered the store with the intent to rob it. With money actually in hand he had retreated to the doorway and could have easily left the premises without inflicting physical trauma to anyone. Nevertheless, he fired, at close range and for no apparent reason, a shotgun blast into the abdominal organs of store proprietor Woods and then, in the words of Chief Judge Coleman, "coolly reloaded his shotgun as if he had done no more than kill a rabbit." [655 F.2d at p. 1379] We concur with Judge Coleman that the conclusion reached by the Court of Appeals is "bad wrong."

Even a capitally charged defendant is not entitled to a perfect trial. The Constitution only demands that his

trial be fundamentally fair. In our opinion, Mr. Washington received a fair trial free of constitutional error. We respectfully submit the petition for certiorari should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Billy L. Gore, Assistant Attorney General for the State of Mississippi and one of the attorneys for the Petitioners do hereby certify that I have this day served a true and correct copy of the foregoing Petition for Writ of Certiorari to the following:

Honorable Grady F. Tollison, Jr.
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Honorable James S. Liebman
Honorable Joel Berger
Honorable John C. Boger
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Honorable James L. Robertson
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Honorable Patrick Dale O'Rourke
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This, the 1st day of March, 1982.

BILLY L. GORE
Assistant Attorney General

Appendix

APPENDIX

APPENDIX 1

John Lewis WASHINGTON,
Petitioner-Appellant,

v.

John C. WATKINS, Commissioner, Mississippi Department of Corrections, et al.,
Respondents-Appellees.

No. 80-3072.

United States Court of Appeals,
Fifth Circuit.
Unit A

Sept. 14, 1981.

Defendant was convicted in a Mississippi court of capital murder, and conviction and sentence were affirmed by the Supreme Court of Mississippi. The United States District Court for the Northern District of Mississippi, at Greenville, William C. Keady, Chief Judge, after holding an evidentiary hearing, denied habeas corpus relief. On appeal, the Court of Appeals, Randall, Circuit Judge, held that: (1) defendant was not denied effective assistance of counsel in the guilt phase of his trial, but (2) process by which state secured death sentence for the crime was constitutionally flawed because jury was precluded, by instructions, from considering nonstatutory mitigating factors in violation of a decision by the United States Supreme Court.

Affirmed in part; reversed in part and remanded.

Coleman, Circuit Judge, dissented and filed opinion.

1. Criminal Law (Key) 641.13(1)

Every ineffective assistance claim must, at bottom, be founded on allegations of what are termed basic, primary or historical facts, i. e., facts in sense of recital of external events and credibility of their narrators, but claim also requires application of principles of federal law to basic, primary, or historical facts of case. U.S.C.A.Const. Amend. 6; 28 U.S.C.A. § 2254(d).

2. Criminal Law (Key) 1158(1)

Mixed questions of fact and law are not, as general matter, reviewable under clearly erroneous standard, but, rather, as to legal effect to be accorded district court's findings of basic, historical fact, Court of Appeals is free to substitute its own judgment for that of district court. Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.; 28 U.S.C.A. § 2254(d).

3. Courts (Key) 90(2)

Panel of Court of Appeals cannot overrule decision of another panel, nor can one panel disregard precedent set by prior panel even though error is conceived in the precedent, and, absent overriding Supreme Court decision or change in statutory law, only court sitting en banc can do this.

4. Criminal Law (Key) 1158(1)

Whether defendant has enjoyed effective assistance of counsel is mixed question of fact and law, and though subsidiary findings of basic, historical fact that district court has made after it has conducted evidentiary hearing are subject to review under clearly erroneous standard, district court's ultimate conclusion as to whether defendant enjoyed effective assistance is not subject to review under that

standard but, rather, Court of Appeals must make independent evaluation based on those subsidiary findings in determining whether representation satisfied qualitative, normative standards dictated by Sixth and Fourteenth Amendments. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed. Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

5. Criminal Law (Key) 641.13(1)

Standard for constitutionally effective assistance of counsel is not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render and rendering reasonably effective assistance. U.S. C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

6. Criminal Law (Key) 641.13(3)

Standard for constitutionally effective assistance of counsel does not vary in accordance with whether counsel was retained or appointed. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

7. Habeas Corpus (Key) 25.1(6)

Reasonably effective assistance of counsel must be judged from perspective of counsel, taking into account all circumstances of case, but only as those circumstances were known to him at time in question, and even when counsel's investigation and preparation are determined to have been seriously inadequate, there must be showing that habeas petitioner was to some degree prejudiced thereby. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed. Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

8. Criminal Law (Key) 641.13(1)

Constitutional standards for effective assistance of counsel do not vary according to severity of punishment imposed upon defendant, but severity of sentence faced by defendant may be considered in overall determination whether counsel has been constitutionally adequate in given case, the number, nature and seriousness of charges being all part of "totality of circumstances in the entire record" to be considered along with strength of prosecution's case and strength and complexity of possible defenses. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.; Miss.Code 1972, § 99-19-101(5)(d, h).

9. Criminal Law (Key) 641.13(6)

In capital case, counsel for defense was not shown to have been ineffective by virtue of failure to interview certain witnesses. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

10. Criminal Law (Key) 641.13(6)

In capital case, if there was duty on part of defense counsel to interview two eyewitnesses other than alleged accomplice, there was failure to show any resulting prejudice. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

11. Criminal Law (Key) 339.10(3)

Even if there was something impermissibly suggestive in alleged accomplice's confrontation with defendant that might have tainted in-court identification, no right to suppression was shown in view of failure to demonstrate that, under totality of circumstances, very substantial like-

lihood of misidentification existed at the trial. U.S.C.A. Const. Amend. 6; 28 U.S.C.A. § 2254.

12. Habeas Corpus (Key) 85.5(11)

Ineffective assistance of counsel was not shown with respect to failure to interview alibi witnesses without showing, in habeas corpus proceeding, that nontestifying partygoers would have corroborated alibi defense, and there was likewise no showing that failure to interview some of witnesses who testified, whether as prosecution witnesses or defense witnesses, in any way prejudiced defense. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

13. Habeas Corpus (Key) 85.5(11)

Ineffective representation was not shown in failure during voir dire examination to probe venire members' racial attitudes, in view of counsel's testimony at habeas hearing that he made conscious tactical decision not to expand on trial court's and prosecutor's general questioning of jury regarding their fairness and impartiality. U.S. C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

14. Criminal Law (Key) 641.13(2)

Ineffectiveness of counsel was not shown on the ground that, had counsel spent more time consulting with defendant, defendant would have chosen not to pursue alibi defense, in view of absence of any other viable defense. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C A. § 2254; Fed. Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

15. Homicide (Key) 18(1)

Under Mississippi law, defendant's specific intent to kill was irrelevant under felony-murder provision. Miss.Code 1972, § 97-3-19.

16. Criminal Law (Key) 641.13(2)

Trial counsel's performance on balance and in context of entire capital case was far more than adequate. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed. Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

17. Habeas Corpus (Key) 113(5½)

State, not having previously raised contention that defense failed to object to instruction given at murder trial was itself precluded from raising, on appeal in habeas corpus proceeding, any claim that defendant should be barred by reason of having failed to object at trial to such instruction. 28 U.S.C.A. § 2254.

18. Habeas Corpus (Key) 113(5½)

Where Mississippi Supreme Court had expressly addressed merits of defense claim in his direct appeal, rather than applying contemporaneous objection rule to bar consideration of the merits, federal court on appeal in habeas corpus proceeding could consider such claim. 28 U.S.C.A. § 2254.

19. Habeas Corpus (Key) 25.1(4)

Instruction was to be taken as a whole, and even deficiency discovered in language of charge taken as a whole was not grounds for relief in federal habeas corpus without violation of some right guaranteed to defendant by Fourteenth Amendment and showing that ailing instruction by

itself so infected entire trial that result violated due process. U.S.C.A.Const. Amends. 6, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.

20. Criminal Law (Key) 796

In capital case, trial court in instructing jury as to two aggravating factors which were at issue in case quite properly made it clear to jury that it could consider only such two aggravating factors, and no others, but by reason of instructions taken as a whole, jurors could possibly erroneously infer that it was their duty to consider only two mitigating factors specifically enumerated in charge. Miss. Code 1972 § 99-19-101(5) (d, h), (6) (a, g).

21. Courts (Key) 101

Where, although only three justices joined in opinion of Chief Justice of the United States Supreme Court in decision, it appeared that death sentence imposed by sentencer barred from considering mitigating circumstances would be vacated by six-member majority of the Supreme Court, the Chief Justice's plurality opinion would be taken, for purposes of case at bar, as if it represented views of majority of the court. Miss.Code 1972, § 99-19-101 (6) (a, g).

22. Criminal Law (Key) 839

Contention that jury had been improperly prevented from considering mitigating circumstances, in capital case, could be raised through challenge to instructions given by trial court to jury that convicted defendant. Miss.Code 1972, § 99-19-101(6) (a, g).

23. Constitutional Law (Key) 270(2)
Criminal Law (Key) 1213

Error in trial court's proscription of jury consideration of nonstatutory mitigating circumstances, in capital case, was one of constitutional proportion that violated rights secured to defendant under Eighth and Fourteenth Amendments, and error unquestionably so infected sentencing proceedings as to drain them of fundamental fairness, precluding imposition of death sentence on basis of sentencing proceedings at issue, and same was true despite fact that counsel adverted to nonstatutory mitigating circumstances during closing argument and despite state's contention that circumstances removed from jury's consideration were not reasonably likely to generate sympathetic consideration from jury. U.S.C.A.Const. Amends. 6, 8, 14; 28 U.S.C.A. § 2254; Fed.Rules Civ.Proc. Rule 52(a), 28 U.S.C.A.; Miss. Code 1972, §§ 99-19-101(1, 2), (6)(a, g), 99-19-103.

Patrick Dale O'Rourke, Jackson, Miss., Grady F. Tollison, Jr., Oxford, Miss., Anthony G. Amsterdam, Stanford Univ. Law School, Stanford, Cal., James S. Liebman, Joel Berger, John C. Boger, Judith Reed, Deborah Fins, New York City, for petitioner-appellant.

Billy Gore, Asst. Atty. Gen., Jackson, Miss., for respondents-appellees.

Appeal from the United States District Court for the Northern District of Mississippi.

Before WISDOM, COLEMAN and RANDALL, Circuit Judges.

RANDALL, Circuit Judge:

On May 25, 1977, a jury in the Circuit Court of Lowndes County, Mississippi, convicted Petitioner-Appellant Johnny Washington of capital murder for the March 26, 1977, shooting of Karl Woods during the armed robbery of a convenience store in Columbus, Mississippi. After finding Washington guilty, the jury returned a sentence of death.

Washington's conviction and sentence were affirmed on direct appeal to the Supreme Court of Mississippi. *Washington v. State,* 361 So.2d 61 (Miss.1978) (en banc), *cert. denied,* 441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979). After the Mississippi Supreme Court rejected additional arguments that Washington raised through a coram nobis petition, he petitioned the court below for a writ of habeas corpus under 28 U.S.C. § 2254 (1976). After holding an evidentiary hearing, the district court denied habeas relief in an unpublished opinion.

On appeal, Washington asserts a number of grounds for habeas relief; we reach only two. For the reasons set forth below in part II of this opinion, we affirm the judgment of the district court insofar as it held that Washington received effective assistance of counsel at his trial. For the reasons set forth below in part III of this opinion, however, we reverse the judgment of the district court insofar as it held that the sentencing phase of Washington's trial comported with the Constitution despite jury instructions that limited sharply the mitigating circumstances which the jury could consider in determining whether Washington should be sentenced to death. Accordingly, we remand the case to the district court with instructions to enter judgment granting appropriate habeas corpus relief.

I. FACTUAL BACKGROUND LEADING TO THIS APPEAL

Washington's trial was neither lengthy nor especially complicated. The Mississippi Supreme Court's opinion from Washington's direct appeal accurately summarizes the evidence presented at the trial:

> Woods Quick Pick, a Columbus, Mississippi, convenience store, was robbed on the night of March 26, 1977, by two men armed with shotguns and wearing stocking masks. During the robbery, one of the bandits, later identified as Johnny Lewis Washington, at close range shot J.K. [Karl] Woods, the proprietor of the store, in the stomach with a long-barrel shotgun loaded with buckshot. Woods died about five hours later in a Columbus hospital.
>
> Booker T. Cole, Jr. testified that between 7:30 and 8:00 P.M. on March 26, 1977, Johnny Washington contacted him and told him to come by his house because "he had something up." Some time later, when Cole arrived at Washington's house, the defendant told Cole that they were going to rob [the] Quick Pick. Washington provided Cole with a stocking mask and a sawed-off shotgun, and they took up their station across the street from Woods Quick Pick. After assembling and loading their shotguns, when the coast was clear they ran across the street and into Woods Quick Pick store. J.K. Woods, owner of the store, Roy Thompson, an employee, and a female employee, Elouise Clark, were in the store. [Thompson testified that Woods had been drinking prior to the robbery, and was somewhat intoxicated at the time.]
>
> Cole and Washington pointed their shotguns at Woods and Thompson, and told them to open the cash

registers and "give us the money." Thompson began to put the money from the first cash register into a brown paper sack. Cole, the smaller and younger of the two robbers, found a bank sack of money in a cabinet drawer, and he fled with that sack.

Washington, in the meantime, ordered Woods to put the money from the second cash register into the same paper sack that Thompson had put the money from the first cash register. Woods misunderstood and reached for another paper sack, whereupon, according to the testimony of Thompson, Washington hit Woods over the head with the gun barrel "just as hard as he could." In falling, Woods knocked Thompson's sack of money off on the floor. Washington told Thompson not to move and placed the shotgun about 8 inches from Thompson's head. Woods went ahead and picked up the sack and sacked the money from the second cash register.

As Woods handed Washington the sack in one hand, he reached for the gun barrel with the other, but missed, and Washington kept the gun on Woods as he, Washington, backed toward the door. Woods moved slowly toward Washington. Just before he left, Washington fired his shotgun into Woods' stomach. Washington reloaded his shotgun and left. Thompson testified that Washington and Woods were about 10 feet apart when Washington fired, and that Washington could very easily have made his exit with his sack of money without shooting Woods.

Cole testified that he was a short distance away when he heard the shot, and Washington came running out of the store telling Cole that he had shot Woods. Cole testified that later that night, about 12:30 or 1:00

A.M., they got together and divided the money (about $600) between them.

Washington's defense was that he was at a party [at his brother Freddie's apartment], was not at Woods Quick Pick, did not commit the robbery, nor did he kill Woods. [While several of the defense witnesses corroborated Washington's alibi,] [s]everal people at the party testified that Washington did not arrive there until around midnight. . . .

Ben Hodo of Ethelsville, Alabama, was visiting his grandmother in Columbus, Mississippi on the night of the robbery. He testified that around 10:00 P.M., as he was going down to Lee's Restaurant to get something to eat, he saw a man in an alley next to Woods Quick Pick with a long gun and a sack full of money. Hodo testified that he and the man with the long gun looked at each other about 10 seconds and that they were close together. He positively identified Washington as the one he saw in the alley with the sack of money and the long gun.

361 So.2d at 63-64. Another prosecution witness, Curtis Cobb, testified that he had seen Washington and Cole retrieve a shotgun and a money bag from some bushes later that night. Through police officers and other investigators, the State also presented some physical evidence that tended circumstantially to link Washington with the crime. The State also presented medical evidence as to the cause and manner of Woods' death. "After a full trial (the Record on the guilt phase consisting of 308 pages in two volumes), the jury returned a verdict of guilty of capital murder." *Id.* at 64.

In the separate sentencing hearing, both sides presented evidence as to mitigating and aggravating circumstances,

to be considered in addition to the evidence adduced at trial. As additional evidence of aggravating circumstances, the State again called Thompson to the stand to testify as to the pointlessness of the shooting given that Washington could have made good his escape without firing.

> In mitigation, Washington testified that he was 23 years old, that, while he had been living with a lady for about five years, he was not married but had a three-year-old daughter by her. When asked by his counsel whether he had ever been convicted of a crime, Washington replied that he had been convicted of a "marijuana crime that same year" for which he had paid a $400 fine.

Id. at 64. After receiving the trial court's charge for the sentencing phase of the trial, the jury returned the death sentence, finding (1) that Washington had committed the crime of capital murder while engaged in the commission of the crime of robbery, a statutory aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(d) (1980 Supp.); (2) that Washington committed the capital murder "in an especially heinous, atrocious or cruel manner," a statutory aggravating circumstance under Miss. Code Ann. § 99-19-101(5)(h) (1980 Supp.); (3) that these two aggravating factors warranted the imposition of the death penalty; and (4) that there were insufficient mitigating circumstances to outweigh the aggravating circumstances. Accordingly, the trial court sentenced Washington to death.

As noted above, the Mississippi Supreme Court affirmed Washington's conviction and sentence, rejecting Washington's arguments that the "especially heinous, atrocious or cruel" language of section 99-19-101(5)(h) was unconstitutionally vague and that the death penalty is unconstitutional per se. 361 So.2d at 65-66. The court also determined that the evidence in the case supported the

jury's imposition of the death penalty, and that this death sentence was not excessive or disproportionate to the penalty imposed in similar cases, characterizing the killing of Woods as "an especially wanton, willful, useless and cruel killing." *Id.* at 66-67. Finally, the court rejected Washington's contention that his sentence was imposed in violation of *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978). 361 So.2d at 67-68.[1] The United States Supreme Court denied certiorari, 441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388 (1979).

Washington then sought federal habeas corpus relief under 28 U.S.C. § 2254 (1976). The court below granted a stay of execution pending Washington's exhaustion of his state remedies as to certain claims that he had not made in his direct appeal. On the same day—May 25, 1979—the Mississippi Supreme Court summarily denied Washington's request for leave to file a petition for writ of error coram nobis in the state trial court in which Washington was convicted; thus, no hearing was ever held in the state courts on Washington's ineffective assistance of counsel claim.[2] The

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1. See note 53 *infra*.

2. Accordingly, 28 U.S.C. § 2254(d) (1976) and *Sumner v. Mata*, ... U.S. ....., 101 S.Ct. 764, 66 L.Ed.2d 722 (1981), have no direct relevance to the case at bar. Other than Washington's trial itself, there was never an evidentiary hearing in the state courts. *Sumner* emphasized that the presumption of validity created by § 2254(d) applies only "to cases in which a state court of competent jurisdiction has made 'a determination after a hearing on the merits of a factual issue.'" ..... U.S. at ....., 101 S.Ct. at 769. Here, however, Washington's *Lockett* argument is a purely legal one that depends upon nothing other than the transcript of his state-court trial; and as in *Via v. Superintendent, Powhatan Correctional Center*, 643 F.2d 167 (4th Cir. 1981), virtually all of

> [t]he material facts relevant to the claim of ineffective assistance of counsel are not disclosed by the state trial record. They were developed at the federal evidentiary hearing. Under these circumstances, the requirements of 28 U.S.C. § 2254(d) are not applicable.

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State does not contend on appeal that Washington has failed to exhaust his state remedies.

On recommendation of the United States Magistrate to whom the court below referred the case, the district court held a hearing on November 9, 1979, limited solely to Washington's ineffective assistance of counsel claim. After due consideration, the court concluded in an unpublished memorandum opinion that Washington had not been denied effective assistance of counsel. The court also rejected Washington's other asserted grounds for habeas corpus relief with respect to his death sentence. Accordingly, the district court entered judgment denying in its entirety Washington's petition for a writ of habeas corpus on December 18, 1979. This appeal followed.

II. THE EFFECTIVENESS OF WASHINGTON'S COUNSEL

A. The Standard by Which We Review a Federal District Court's Determination on an Ineffective Assistance of Counsel Claim

[1] Every ineffective asistance claim must, at bottom, be founded on allegations of "what are termed basic, primary, or historical facts: facts 'in the sense of a recital of external events and the credibility of their narrators . . .,'" *Townsend v. Sain*, 372 U.S. 293, 309 n.6, 83 S.Ct. 745, 755 n.6, 9 L.Ed2d 770 (1963) (quoting *Brown v. Allen*, 344 U.S. 443, 506, 73 S.Ct. 397, 446, 97 L.Ed. 469 (1953) (opinion of Frankfurter, J.)). But every ineffective as-

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Id. at 169 n.3 (citing *Sumner*). Insofar as some few of the facts material to Washington's ineffective assistance claim are evidenced only by the state-court trial transcript—for example, whether counsel objected at a particular moment, or whether a witness gave certain testimony—those facts are undisputed in this appeal, and ws accept them without question.

sistance claim also requires the application of principles of federal law to the "basic, primary, or historical" facts of the case. In *Walker v. Caldwell*, 476 F.2d 213, 216 (5th Cir. 1973), a panel of this court noted that "there is a legal standard, by definition normative and prescriptive, which must be applied to a particular set of facts in order to determine whether an accused received effective assistance of counsel." Accordingly, *Walker* held that "[t]he precise issue of whether a particular defendant enjoyed 'effective' assistance of counsel, is, in the end, . . . a question of *law*." *Id.* (emphasis in original). The *Walker* court determined that even if it accepted the somewhat questionable findings of basic, historical facts made in that case by the federal district court after an evidentiary hearing, the court below had erred in its ultimate conclusion that the defendant had enjoyed effective assistance of counsel.

When a federal district court conducts an evidentiary hearing in connection with an ineffective assistance claim, it ordinarily does so in order that it may determine disputed issues of basic, historical fact, which frequently hinge on credibility choices. Both before and after the *Walker* decision, this court has reviewed the district courts' findings on such issues of basic, historical fact under the "clearly erroneous" standard mandated by Fed.R.Civ.P. 52(a).[3]

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3. *E. g., Fisher v. Wainwright*, 584 F.2d 691, 693-94 (5th Cir. 1978) (whether defendant's attorney told defendant he was prepared and willing to go to trial); *White v. Estelle*, 566 F.2d 500, 502 (5th Cir. 1978) (whether defendant's attorneys withdrew defendant failed to keep appointments with them); *Bartelt v. United States*, 505 F.2d 647, 648-49 (5th Cir. 1974) (per curium) (whether defendant's attorney told the defendant that he would not handle the defendant's appeal unless fees and new evidence were forthcoming, and whether defendant was aware that indigents are entitled to an appointed attorney on appeal); *Chalk v. Beto*, 429 F.2d 225, 227 (5th Cir. 1970) (whether quality of legal services accorded defendant was so poor that he did not

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[2] By comparison, a long line of Fifth Circuit cases have held, consistently with *Walker*, that whether a defendant has received effective assistance of counsel is a "mixed question of fact and law," rather than purely a question of fact.[4] *E. g., Harris v. Oliver*, 645 F.2d 327, 330 n.3 (5th Cir. 1981); *Norris v. Wainwright*, 588 F.2d 130, 134-35 (5th Cir.), *cert. denied*, 444 U.S. 846, 100 S.Ct. 93, 62 L.Ed.2d 60 (1979); *United States v. Gray*, 565 F.2d 881, 887 & n.18 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.Ed.2d 807 (1978); *Trahan v. Estelle*, 544 F.2d 1305, 1314 (5th Cir. 1977) (Goldberg, J., specially concurring); *Mason v. Balcom*, 531 F.2d 717, 721-23 (5th Cir. 1976); *Lee v. Hopper*, 499 F.2d 456, 462 (5th Cir.), *cert. denied*, 419 U.S. 1053, 95 S.Ct. 633, 42 L.Ed.2d 650 (1974).[5] Mixed

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have an opportunity to present his side of the story); *Caraway v. Beto*, 421 F.2d 636, 637 (5th Cir. 1979) (per curiam) (precise steps taken by defendant's attorney in investigating and preparing case); *Washington v. Smith*, 417 F.2d 301, 302 (5th Cir. 1969) (per curium) (whether defendant was in fact represented by counsel when he entered his guilty plea).

4. The term "mixed question of fact and law" seems to be used interchangeably in our prior decisions with the term "ultimate fact" (as distinguished from "subsidiary" or "intermediate" facts).

5. *See also Hill v. Wainwright*, 617 F.2d 375, 380 (5th Cir. 1980) ("as a matter of law," defendant's counsel was not ineffective); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972) (per curiam) (declining to review under Rule 52(a) the district court's implicit factual finding that counsel's failure to interview alibi witnesses denied defendant the benefit of that witness, because "the district court erred as a matter of law in ruling that the undisputed facts failed to constitute ineffective assistance").

Cf. Cuyler v. Sullivan, 446 U.S. 335, 342, 100 S.Ct. 1708, 1715, 64 L.Ed.2d 333 (1980) (state courts' holding that attorneys representing co-defendants did not engage in multiple representation was "a mixed determination of law and fact that requires the application of legal principles to the historic facts of this case," and hence was not entitled to a presumption of validity under 28 U.S.C. § 2254(d) (1976).

These cases have often arisen in connection with the presumption of validity accorded under § 2254(d) to state-court

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questions of fact and law are not, as a general matter, reviewable under the clearly erroneous standard. *E. g., Baker v. Metcalfe,* 633 F.2d 1198, 1201 (5th Cir.), *cert. denied,* ..... U.S. ....., 101 S.Ct. 2055, 68 L.Ed.2d 354 (1981) (reviewing district court's determination on state prisoner's double jeopardy claim brought through federal habeas corpus); 9 C. Wright & A. Miller, Federal Practice and Procedure § 2589, at 753 (1971). Rather, as to the legal effect to be accorded the district court's findings of basic, historical fact, the court of appeals is free to substitute its own judgment for that of the district court. *Baker,* 633 F.2d at 1201.[6]

At least four recent Fifth Circuit cases, however, suggest that whether a defendant has received effective assistance of counsel is a purely factual question that is entitled to protection under the clearly erroneous standard of Rule 52(a). *See United States v. Hughes,* 635 F.2d

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factual findings that are implicated in a federal habeas corpus action brought under § 2254; however, we can conceive of no principled rationale for holding that effective assistance is purely a factual question when decided by a federal judge, but a mixed question of fact and law when decided by a state judge. *But cf. Lee v. Hopper,* 499 F.2d at 462 (treating state court's determination on effectiveness as a mixed question of fact and law not entitled to presumption of validity under § 2254(d), but treating federal district court's determination as one of pure fact, without explanation or citation).

6. *Cf. Brown v. Sibley,* 650 F.2d 760, 766 & n.8 (5th Cir. 1981); *Smith v. Farah Mfg. Co.,* 650 F.2d 64, 68 (5th Cir. 1981); *Danner v. United States Civil Service Comm'n,* 635 F.2d 427, 430-31 (5th Cir. 1981); *Thompson v. Leland Police Dep't,* 633 F.2d 1111, 1112 (5th Cir. 1980); *Causey v. Ford Motor Co.,* 516 F.2d must make independent determination as to "ultimate fact" of unlawful discrimination, after first reviewing the district court's determination of requisite subsidiary facts under the "clearly erroneous" standard of Rule 52(a)); Younglbood & Folse, *Can Courts Govern? An Inquiry Into Capacity and Purpose,* in Governing Through Courts ..... & nn.43-45 (R. Gambitta, M. May & J. Foster eds. 1981) (discussing in detail the widely varying positions of the circuits on this issue and the implications thereof).

449, 451, 453 (5th Cir. 1981); *Pollinzi v. Estelle*, 628 F.2d 417, 418 (5th Cir. 1980) (per curiam); *Brown v. Blackburn*, 625 F.2d 35, 36 (5th Cir. 1980) (per curiam); *Jones v. Wainwright*, 604 F.2d 414, 416-18 (5th Cir. 1979) (per curiam). None of these cases cites *Walker* or the other Fifth Circuit cases that have held that effective assistance is a mixed question of fact and law; rather, *United States v. Hughes*, *Pollinzi v. Estelle*, *Brown v. Blackburn*, and *Jones v. Wainwright* each relies solely on ineffective assistance cases[7] in which we have applied the clearly erroneous standard only to subsidiary questions of basic historical fact—*i. e.*, to facts "in the sense of a recital of external events and the credibility of their narrators." Given the absence of supporting precedent for these four cases, and the presence of a long line of contrary Fifth Circuit precedent, the validity of these four cases must be questioned insofar as they hold[8] that a district court's finding on the ultimate question of whether a defendant received effective assistance of counsel is subject to review under the clearly erroneous standard.[9]

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7. *United States v. Hughes* cites only *Washington v. Smith* and Rule 52(a) itself. *Pollinzi v. Estelle* relies upon *Fisher v. Wainwright*, *White v. Estelle*, and *Bartelt v. United States*. *Brown v. Estelle* relies solely upon *Caraway v. Beto*, and *Jones v. Wainwright* relies solely upon *Fisher v. Wainwright*. As should be clear from the brief discussion of these precedents in note 3, *supra*, none of them supports the proposition that whether a defendant has received effective assistance is a purely factual question subject to review under Rule 52(a).

8. *Pollinzi v. Estelle*, *Brown v. Blackburn*, and *Jones v. Wainwright* are less emphatic on this point than a cursory reading might indicate, and it may be that they only fail clearly to distinguish between their initial application of the clearly erroneous standard in reviewing subsidiary findings of basic, historical fact, and their subsequent, independent application of legal standards to those subsidiary findings in answering the ultimate question of whether the defendant received effective assistance of counsel.

9. Indeed, it appears that of late there has been a surprising amount of controversy as to which issues are mixed questions of fact and law, and which are questions of pure fact.

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[3, 4] Faced with this possible conflict, we follow the longer established and more extensive line of prece-

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Footnote continued—

Compare Sumner v. Mata, ... U.S. ....., 101 S.Ct. 764, 66 L.Ed.2d 722 (1981) (whether pretrial photographic identification procedures were so impermissibly suggestive as to give rise to a likelihood of irreparable misidentification is treated as question of fact entitled to a presumption of validity under § 2254(d)), *with id.* at ....., 101 S.Ct. at 773-75 (Brennan, J., dissenting) (arguing that constitutionality of identification procedures in that case was a mixed question of fact and law; "[p]lainly, the disagreement between the [state and lower federal] courts is over the constitutional significance of the facts of the case, and not over the facts themselves"); *Cuyler v. Sullivan*, 446 U.S. 335, 341-42, 100 S.Ct. 1708, 1714-1715, 64 L.Ed.2d 333 (1980) (state-court holding that lawyers for co-defendants did not engage in multiple representation is a mixed determination of law and fact entitled to no presumption of validity under § 2254(d)); and *Neil v. Biggers*, 409 U.S. 188, 193 n.3, 93 S.Ct. 375, 379, n.3, 34 L.Ed2d 401 (1972) (clearly erroneous rule inapplicable in reviewing lower courts' determination that suggestive identification procedures offended constitutional guarantees of due process; "the dispute between the parties it not so much over the elemental facts as over the constitutional significance to be attached to them").

The controversy has also appeared with regard to appellate review of a federal district court's decision as to whether any rational trier of fact could have found proof of guilt beyond a reasonable doubt based on the evidence adduced at a habeas corpus petitioner's state-court trial. *Compare Jackson v. Virginia*, 443 U.S. 307, 318-19, 99 S.Ct. 2781, 2789, 61 L.Ed.2d 560 (1979) (federal courts have duty to assess historic facts when called upon to apply constitutional standards to convictions obtained in state court; factfinder's role as weigher of evidence is preserved "through a legal conclusion" that all of the evidence is to be considered in the light most favorable to the prosecution in determining whether any rational trier of fact could have found guilt beyond a reasonable doubt); and *Holloway v. McElroy*, 632 F.2d 605, 640 n.54 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 3019, 69 L.Ed.2d ..... (1981) (constitutional sufficiency of evidence supporting state-court conviction is a question of law; whether district court applied erroneous standard was therefore irrelevant to court of appeals' review), *with Davis v. McAllister*, 631 F.2d 1256, 1262 (5th Cir. 1980) (finding "clearly erroneous" the district court's holding that the evidence supporting petitioner's conviction was constitutionally insufficient, citing *Brown v. Blackburn* and *Caraway v. Beto*). Insofar as *Davis* may perpetuate *Brown v. Blackburn's* use of the clearly erroneous standard to review legal determinations or mixed determinations of fact and law, *Davis*, too, must be questioned.

dent.[10] Accordingly, we hold that whether a defendant has enjoyed effective assistance of counsel is a mixed question of fact and law. While subsidiary findings of basic, historical fact that the district court has made after it has conducted an evidentiary hearing are subject to review under the clearly erroneous standard of Rule 52(a), the district court's ultimate conclusion as to whether the defendant enjoyed effective assistance of counsel is not subject to review under that standard, and the court of appeals must make an independent evaluation based on those subsidiary findings in determining whether counsel's representation satisfied the qualitative, normative standards dictated by the Sixth and Fourteenth Amendments to the Constitution.

B. Constitutional Standards for Effective Assistance of Counsel

1. The general legal standards.—"In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S.Const. amend.

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10. "As a panel of this Court, we are without power to overrule a decision of another panel. That task falls solely to the full Court sitting *en banc*." *Ford v. United States*, 618 F.2d 357, 361 (5th Cir. 1980). Neither can one panel "disregard the precedent set by a prior panel, even though it conceives error in the precedent. Absent an overriding Supreme Court decision or a change in the statutory law, only the Court sitting *en banc* can do this." *Davis v. Estelle*, 529 F.2d 437, 441 (5th Cir. 1976). *See also Republic of Texas Corp. v. Board of Governors of the Federal Reserve System*, 649 F.2d 1026, 1045 n.35 (5th Cir. 1981); *Ellis v. Great Southwestern Corp.*, 646 F.2d 1099, 1109 (5th Cir. 1981); *Hernandez v. City of Lafayette*, 643 F.2d 1188, 1192-93 (5th Cir. 1981). Here, we cannot pay heed to one line of precedent without disregarding the other, and we lack the authority to overrule one line at the other's expense.

Nonetheless, our decision to make an independent determination as to whether Washington received effective assistance of counsel, which gives him the benefit of the less restrictive standard of review, should not be a controversial one, given our ultimate disposition of Washington's ineffective assistance claim below in part II-C of this opinion.

VI. The Supreme Court has recently reemphasized that its decisions

> make clear that inadequate assistance does not satisfy the Sixth Amendment right to counsel made applicable to the States through the Fourteenth Amendment. . . . [T]he Sixth Amendment does more than require the States to appoint counsel for indigent defendants. The right to counsel prevents the state from conducting trials at which persons who face incarceration must defend themselves without adequate legal assistance.

Cuyler v. Sullivan, 446 U.S. 335, 344, 100 S.Ct. 1708, 1716, 64 L.Ed.2d 333 (1980).

[5, 6] In this circuit, the standard for constitutionally effective assistance of counsel is "not errorless counsel, and not counsel judged ineffective by hindsight, but counsel reasonably likely to render *and rendering* reasonably effective assistance." *Herring v. Estelle*, 491 F.2d 125, 127 (5th Cir. 1974) (quoting *MacKenna v. Ellis*, 280 F.2d 592, 599 (5th Cir. 1960), *adhered to in pertinent part on rehearing en banc*, 289 F.2d 928 (5th Cir.), *cert. denied*, 368 U.S. 877, 82 S.Ct. 121, 7 L.Ed.2d 78 (1961) (emphasis by *MacKenna* panel)).[11] "[T]he methodology for applying this standard involves an inquiry into the actual performance of counsel conducting the defense and a determination of whether reasonably effective assistance was rendered based on the *totality* of circumstances in the entire

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11. *Accord, United States v. Burroughs*, 650 F.2d 595, 598 (5th Cir. 1981); *Ogle v. Estelle*, 641 F.2d 1122, 1128 (5th Cir. 1981); *Hill v. Wainwright*, 617 F.2d 375, 380 (5th Cir. 1980); *Wilkerson v. United States*, 591 F.2d 1046, 1047 (5th Cir. 1979); *Franklin v. United States*, 589 F.2d 192, 194 (5th Cir.), *cert. denied*, 441 U.S. 950, 99 S.Ct. 2177, 60 L.E.2d 1055 (1979); *Jones v. Estelle*, 584 F.2d 687, 690 (5th Cir. 1979); *Carbo v. United States*, 581 F.2d 91, 92 (5th Cir. 1978); *United States v. Alvarez*, 580 F.2d 1251, 1254 (5th Cir. 1978).

record." *Washington v. Estelle*, 648 F.2d 276, 279 (5th Cir. 1981) (emphasis in original).[12] The standard does not vary in accordance with whether counsel was retained or appointed. *Cuyler*, 446 U.S. at 344-45, 100 S.Ct. at 1716.[13]

Our cases have recognized that whether counsel has rendered reasonably effective assistance cannot be determined solely by reference to his performance at trial. "Informed evaluation of potential defenses to criminal charges and meaningful discussion with one's client of the realities of his case are cornerstones of effective assistance of counsel." *Gaines v. Hopper*, 575 F.2d 1147, 1149-50 (5th Cir. 1978) (affirming grant of habeas relief on grounds that attorney's failure to conduct adequate investigation, including failure to interview known witnesses, deprived defendant of viable defense that he might otherwise have asserted). "Since 'investigation and preparation are the keys to effective representation,' . . . counsel have a duty

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12. *Accord, Nelson v. Estelle*, 542 F.2d 903, 906 (5th Cir. 1981); *United States v. Gray*, 565 F.2d 881, 887 (5th Cir.), *cert. denied*, 435 U.S. 955, 98 S.Ct. 1587, 55 L.E.2d 807 (1978).

13. *Accord, Torna v. Wainwright*, 649 F.2d 290, 291-92 (5th Cir. 1981); *Perez v. Wainwright*, 640 F.2d 596, 597-99 (5th Cir. 1981); *Kemp v. Leggett*, 635 F.2d 453, 455 (5th Cir. 1981); *United States v. Hughes*, 635 F.2d 449, 451 (5th Cir. 1981); *Jones v. Estelle*, 632 F.2d 490, 491-92 (5th Cir. 1980), *cert denied*, ... U.S. ....., 101 S.Ct. 1992, 68 L.Ed.2d 307 (1981).

These cases properly recognize that *Cuyler* implicitly overruled precedent in this circuit to the contrary, such as *Fitzgerald v. Estelle*, 505 F.2d 1334, 1337 (5th Cir. 1974) (en banc) ("[t]o find state involvement in retained counsel's conduct which is adjudged to be less than reasonably effective, yet not so grossly deficient as to render the proceedings fundamentally unfair, it must be shown that some state official connected with the criminal proceeding who could have remedied the conduct failed in his duty to accord justice to the accused"), *cert. denied*, 422 U.S. 1011, 95 S.Ct. 2636, 45 L.Ed.2d 675 (1975). *But cf. Ogle v. Estelle*, 641 F.2d 1122, 1127-28 & n.4 (5th Cir. 1981); *United States v. Guerra*, 628 F.2d 410, 412-13 & n.1 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981) (both recognizing in footnote the change *Cuyler* worked in Fifth Circuit law, but repeating *Fitzgerald's* state involvement distinctions).

to interview potential witnesses and 'make an independent examination of the facts, circumstances, pleadings and laws involved.' " *Rummel v. Estelle*, 590 F.2d 103, 104 (5th Cir. 1979) (per curiam).[14]

[7] This duty to investigate and prepare is, however, far from limitless, and not every breach thereof will mean that counsel has failed to render reasonably effective assistance. "[C]ounsel for a criminal defendant is not required to pursue every path until it bears fruit or until all conceivable hope withers." *Lovett v. Florida*, 627 F.2d 706, 708 (5th Cir. 1980). Condemning the inevitable and understandable tendencies to the contrary, our cases uniformly command that counsel's effectiveness may not be assessed through the finely ground lenses of 20/20 hindsight—and this command is especially compelling in reviewing claims of ineffective assistance that are grounded in allegations of inadequate investigation and preparation. "Reasonably effective assistance" must be judged from the perspective of counsel, taking into account all of the circumstances of the case, but only as those circumstances were known to him at the time in question. Further, even when counsel's investigation and preparation are determined to have been seriously inadequate, there must be a showing that the habeas petitioner was to some degree prejudiced thereby—of which more later.[15]

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14. *See also Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981); *Davis v. Alabama*, 596 F.2d 1214, 1217 (5th Cir. 1979), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); *Bell v. Georgia*, 554 F.2d 1360, 1361 (5th Cir. 1977); *Mason v. Balcom*, 531 F.2d 717, 724 (5th Cir. 1976); *Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972); *Pennington v. Beto*, 437 F.2d 1281, 1285 (5th Cir. 1971); *Chalk v. Beto*, 429 F.2d 225, 227 (5th Cir. 1970); *King v. Beto*, 429 F.2d 221, 224 (5th Cir. 1970), *cert. denied*, 401 U.S. 936, 99 S.Ct. 921, 28 L.Ed.2d 216 (1971); *Caraway v. Beto*, 421 F.2d 636, 637-38 (5th Cir. 1970).

15. See notes 25-35 *infra* & accompanying text.

[8] *2. The standard for effective assistance of counsel in capital cases.*—Before proceeding further, we must touch briefly upon one of Washington's purely legal arguments. Washington contends on appeal that the Constitution demands "stricter scrutiny of the performance of an attorney whose client is sentenced to die." The only arguably direct support that he cites for this proposition is *Voyles v. Watkins*, 489 F.Supp. 901, 910 (N.D.Miss.1980), in which the district court held that "when the defendant has been convicted of a capital offense, courts must strictly scrutinize counsel's conduct." The *Voyles* court relied chiefly[16] on the plurality opinion in *Gardner v. Florida*, 430 U.S. 349, 357-58, 97 S.Ct. 1197, 1204-05, 51 L.Ed.2d 393 (1977), which emphasized that "[i]t is of vital importance to the defendant and to the community that any decision to impose the death sentence be, and appear to be, based on reason rather than caprice or emotion." This, however, has no direct correspondence to the constitutional standards for effective assistance of counsel. Insofar as *Voyles* indicates that the constitutional standards for effective assistance of counsel vary according to the severity of the punishment imposed upon the defendant, we must disagree.

Washington also relies upon cases such as *Beck v. Alabama*, 447 U.S. 625, 100 S.Ct. 2382, 65 L.Ed.2d 392 (1980), in which the Supreme Court repeated its oft-stated observation that "there is a significant constitutional difference between the death penalty and lesser punishments," *id.* at 637, 100 S.Ct. at 2389, and further noted that

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16. The *Voyles* court also cited *Smotherman v. Beto*, 276 F.Supp. 579, 586 (N.D.Tex.1967), in which the district court cited *Powell v. Alabama*, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158 (1932), as support for the proposition that capital cases require "that every effort be exerted by the court in scrutinizing counsel's conduct." This, however, indicates only that the court was aware of the importance of its task; this language falls far short of announcing a differing standard for effectiveness of counsel in capital cases, and *Powell* would support no such proposition.

> [t]o insure that the death penalty is imposed on the basis of 'reason rather than caprice or emotion,' [the Court has] invalidated *procedural rules* that tended to diminish the reliability of the sentencing determination. The same reasoning must apply to *rules* that diminish the reliability of the guilt determination.

Id. at 638, 100 S.Ct. at 2390 (emphasis added).[17] These cases, however, are inapposite to Washington's argument. In the first place, they are not ineffective assistance cases. More fundamentally, however, these cases generally relate to *procedures* that may affect the degree of accuracy with which guilt and sentencing determinations are made. While it is true that an ineffective lawyer may inject a massive risk of inaccuracy into such determinations, that inaccuracy does not come about through a procedural flaw in the system of justice. Other than the *Voyles* case, Washington has not cited, and our own research has not revealed, any case in which the legal standards for constitutionally adequate assistance of counsel have been held to vary according to the severity of the punishment imposed upon the defendant. We refuse to so hold today.[18]

This is not to say, however, that the severity of the sentence faced by a criminal defendant is not a fact to be considered in the overall determination of whether counsel

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17. There are many other cases to the same effect. *See, e. g., Woodson v. North Carolina*, 428 U.S. 280, 305, 96 S.Ct. 2978, 2991-92, 49 L.Ed.2d 944 (1976) (plurality opinion).

18. Innumerable practical problems would be presented by such a holding. For example, since effective assistance is not judged by hindsight, the heightened standard would have to apply to all cases in which a capital offense was *charged*, regardless of whether the jury subsequently convicted the defendant of a noncapital offense or refused to impose the death penalty in a capital case. Recognition of a "sliding scale" for this constitutional standard would also suggest, for example, that a defendant charged with aggravated assault would be entitled to a more effective lawyer than one charged with simple assault or public intoxication. We decline to embark on such a treacherous path.

has been constitutionally adequate in a given case. While neither in capital nor noncapital cases is a defendant entitled to perfect or error-free representation, the number, nature, and seriousness of the charges against the defendant are all part of the "totality of circumstances in the entire record" that must be considered in the effective assistance calculus, just as are the strength of the prosecution's case and the strength and complexity of the defendant's possible defenses. Nonetheless, while the facts that must be considered will differ in each and every case, the legal standards for constitutionally effective assistance of counsel are constant.

C. The Assistance Rendered by Washington's Counsel

Washington does not contend that his trial counsel, Darrell Reeves, was not "reasonably likely to render . . . reasonably effective assistance"; Reeves' education, experience, and expertise in criminal cases are unassailable.[19] Rather, Washington contends that Reeves did not *render*

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19. Indeed, Washington concedes in his brief that Reeves "did not lack either innate ability or experience." At the federal court hearing, 37-year-old Reeves testified that he had received his undergraduate education at the University of Virginia and his legal education at the University of Mississippi. He estimated that he had practiced law in Columbus for about 11 years; his practice included both civil and criminal litigation in both the state and federal courts. Although Columbus had no public defender program, Reeves testified that he had been one of two local attorneys who was regularly appointed to represent indigent defendants; he estimated that he had tried from 25 to 30 cases involving felony charges, in most of which he had been appointed counsel. In fact, Reeves had obtained a jury verdict of acquittal on armed robbery charges against Johnny Washington some 18-24 months prior to Washington's capital murder trial. (These charges, of course, were never mentioned at the latter trial). Finally, although neither Reeves, the district attorney, nor the state trial judge had tried a capital murder case under Mississippi's statutory bifurcation scheme prior to Washington's trial, the three of them met informally on a number of occasions "just going over procedure to be sure that we were doing it as best we could."

effective assistance *in this case*. As summarized in his brief, Washington contends that Reeves was ineffective in the following respects:

> [1] Counsel failed before trial to interview ten of eleven named prosecution witnesses. He did not interview easily accessible witnesses who could and eventually did undercut [Washington's] alibi defense. [2] He did not investigate the apparent under-representation of blacks on the relevant jury panels, nor at trial did he object to the court's and prosecutor's systematic striking of *all* of the blacks who were on the panel. [3] He did not *voir dire* the remaining white jurors concerning possible racial prejudice toward a black man accused of killing a white man. [4] Additionally, counsel did *no* independent investigation of the aspects of petitioner's character and offense that were relevant to mitigation of sentence.

(Emphasis in original; enumeration added.) We address these arguments in sequence.

[9] *1. Reeves' failure to interview witnesses.*—With respect to Reeves' asserted failure to interview the witnesses named in the prosecution's witness list, the numbers given in the above-quoted excerpt from Washington's brief are somewhat misleading. Five of those witnesses were police officers who had participated in the investigation of Woods' death; since local police officers had standing instructions not to talk to defense counsel except through the chief of detectives, Reeves' decision not to interview them in person can hardly be faulted. Further, Reeves determined through a telephone interview with Roy Thompson (the convenience store clerk who testified about the shooting at trial) that Thompson could not identify or describe the gunmen; given that Washington's alibi defense

did not dispute the events of the hold-up, this telephonic interview was unquestionably adequate. Neither can Reeves be faulted for failing to interview the doctor who testified as to Woods' cause of death: again, the alibi defense did not deny the prosecution's version of the shooting, but merely denied that Washington was involved. Finally, although Reeves did not interview the FBI agent through whom the prosecution introduced the hair samples linking Washington to clothing found near the scene of the crime, Reeves had studied the FBI crime lab report prior to trial and was prepared effectively to cross-examine the agent as to possible inaccuracies in this method of identification. Reeves' representation of Washington was not ineffective by virtue of his failure to interview these witnesses.[20]

Only slightly more troublesome is Reeves' failure to interview Washington's alleged accomplice, Booker Cole. At the habeas hearing, Reeves testified that he had talked to Cole's lawyer, who would not agree to let Reeves interview Cole. Nonetheless, Reeves had heard Cole's version of events at Washington's preliminary hearing; he was fully aware of the details of Cole's plea bargain; and he used Lucy Washington (who was Johnny Washington's sister and Cole's girlfriend) as "more or less a go-between" with Cole.[21] Washington argues that under Mississippi

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20. Although we hold that under these circumstances, Reeves was not ineffective by virtue of his failure thoroughly to interview these witnesses prior to trial, we note too that Washington has in no way suggested—much less demonstrated—how his case was in any way prejudiced by Reeves' failure to interview these witnesses. This, too, would be fatal to his ineffective assistance claim with regard to these witnesses. See notes 25-35 *infra* & accompanying text.

21. In response to questioning from the district court, Reeves gave the following testimony at the habeas hearing:

(Continued on following page)

law,[22] he had an absolute right of access to Cole that Reeves should have asserted on his behalf. Nonetheless, there would have been no guarantee that Cole would have co-operated had Reeves forced an interview over Cole's counsel's objections. In these circumstances, and without considering the fact that Cole's actual testimony at trial was entirely consistent with his testimony at the preliminary

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Footnote continued—

> Q. Other than the, obtaining witnesses from Johnny Washington, did you get any witnesses from his mother or the members of the family?
>
> A. Lucy Washington was more or less a go-between [between] myself and Booker Cole. Booker was incarcerated and Lucy kept telling me that Booker was going to recant his confession. And we went into some of that on cross examination, but he had no intention of recanting.
>
> Q. Did you interview Booker Cole yourself?
>
> A. No.
>
> Q. Was he represented by separate counsel?
>
> A. He was.
>
> Q. Did you make an effort to interview him by permission of his counsel?
>
> A. I talked to his counsel. I am trying to remember now who the counsel was. I don't recall. But they had a plea bargain arrangement worked out so that Booker was going to plead guilty to robbery, not armed robbery, just simple robbery and get a ten year sentence and on that, that he would serve approximately three years. And *his attorney didn't want me anywhere near the case.*
>
> Q. Were you aware of the trade?
>
> A. Yes, sir.
>
> Q. Before trial?
>
> A. Yes, sir.

(Emphasis added.)

22. Both parties cite the Mississippi Supreme Court's holding in *Scott v. State*, 359 So.2d 1355, 1360 (Miss.1978), that "[a] defendant is entitled to access to prospective witnesses; however, this right exists co-equally with the right of a witness to refuse to say anything." We note, however, that Washington's trial took place more than one year prior to the *Scott* decision; as the Mississippi Supreme Court noted in that case, *id.* at 1359, that court had not previously decided whether a trial judge may compel a witness to submit to an interview by counsel. At best, then, Washington's right to compel an interview with Cole was unclear under Mississippi law.

hearing,[23] we cannot agree that Reeves' representation was ineffective by virtue of his failure to interview Cole.

[10] More serious is Reeves' failure to interview the two eyewitnesses (other than Cole) who linked Washington to the shooting: Curtis Cobb, who testified that he saw Cole and Washington retrieve a shotgun and money bag from some honeysuckle bushes near Cobb's house at about 1:00 a.m. following the shooting; and Ben Hodo, who testified that immediately after seeing one masked gunman running across the street from Woods Quick Pick, he saw Washington, unmasked and carrying a shotgun, in the alley behind the building. Washington contends that Reeves' failure to interview these two witnesses[24] was such

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23. Cole's trial testimony may relate to the degree to which Washington's case was prejudiced, if at all, by Reeves' failure to insist that he be allowed to interview Cole prior to trial. It appears that Cole's testimony at trial was entirely consistent with his testimony at the preliminary hearing, at which he was the main witness. Other than suggesting that Reeves might have been able to persuade Cole to recant his confession and implication of Washington, Washington has not suggested that he was prejudiced in any manner by Reeves' failure to insist that he be allowed to interview Cole prior to trial.

Since we must not gauge the effectiveness of counsel by hindsight, however, prejudice is a distinct inquiry from the initial question as to whether Reeves' failure to insist upon interviewing Cole made his representation of Washington ineffective, given the surrounding circumstances and the information available to Reeves prior to trial. Accordingly, we decline to speculate as to whether Reeves might have been able to presuade Cole to recant.

24. In response to questioning by Washington's habeas counsel, Reeves gave the following testimony at the habeas hearing with respect to his failure to interview Cobb:

Q. . . . Did you interview a witness Cobb prior to trial?
A. No.
Q. Curtis Cobb?
A. No.
Q. Did you make any attempt to?
A. I talked to Johnny Washington about Curtis Cobb.
Q. But you didn't attempt to talk with Curtis Cobb?
A. No.

(Continued on following page)

a serious mistake as to have rendered his assistance ineffective, and that as a result of this failure, Reeves was

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Footnote continued—

Also in response to questioning by Washington's habeas counsel, Reeves gave the following testimony at the habeas hearing with respect to his failure to interview Hodo:

> Q. What effort did you make to find out about this witness Hodo and who he was and what his testimony was going to be? Did you attempt to find his grandmother?
>
> A. I asked. Nobody knew. They knew she was in Columbus, but they didn't know where she was. *I didn't really think he was going to be much of a witness based on what they could tell me about him.* They knew his grandmother. He was a, lived in Alabama and he came over and stayed with his grandmother on occasion. But they couldn't tell me where his grandmother lived.
>
> Q. Okay. But you didn't attempt to find out where he was from or where he lived from the District Attorney?
>
> A. I had an address of sorts. Just a minute, it is on here. Route 1, Box 150, Millport.
>
> Q. Okay. Did you attempt to go out there and find out who he was.
>
> A. No.
>
> Q. All right. Had you known what his testimony was going to be prior to trial, would you have filed any motions to deal with his testimony, such as motions to quash the identification?
>
> A. I would have investigated it. I might have.

(Emphasis added.) Later in the hearing, in response to questioning by counsel from the State, Reeves gave the following testimony with respect to Hodo:

> Q. [Washington now alleges] you had failed to establish tainted eye witness testimony. You do recall Hodo's testimony at trial?
>
> A. Yes.
>
> Q. You did not interview Ben Hodo prior to trial?
>
> A. No.
>
> Q. You stated you had an address of Hodo?
>
> A. Rural address.
>
> Q. What document did you read that address from and where did you receive that?
>
> A. From a letter from Thad Buck, who was the [State's] investigator.
>
> Q. In other words, the State released that to you?
>
> A. Yes, on the 13th of May, '77.

(Continued on following page)

unprepared to seek the suppression of Cobb's and Hodo's eye-witness identifications on grounds of undue suggestiveness.

We assume for purposes of argument that Washington is correct in this contention—that is, that given all of the circumstances and the information available to Reeves before the trial, and given the strength of the prosecution's case and the nature of the defense Washington had chosen to pursue, Reeves' failure to interview these two prosecution witnesses despite knowing their names and addresses was a clear and grievous breach of his duties as a defense lawyer. Nonetheless, it is clear beyond peradventure that Washington's rights were in no measure prejudiced by that breach of duty.

There is no doubt but that Hodo's eyewitness identification of Washington was extremely "prejudicial" in the sense that it hurt Washington's case,[25] the same is true,

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Footnote continued—

The district court found as a matter of basic, historical fact that "[n]either [Washington] nor the other members of his family were aware that Hodo was an eyewitness; Reeves, having been furnished with the wrong address, was unsuccessful in locating Hodo prior to trial." In keeping with our assumption above that Reeves committed a serious breach of his duty to investigate in failing to interview Hodo, we will accept for purposes of argument Washington's contention that the court was clearly erroneous in finding that Reeves had been given an incorrect address.

25. In response to questioning by counsel for the State at the habeas hearing, Reeves described Hodo's trial testimony as follows:

> Q. Will you describe the appearance and demeanor of this witness at trial?
>
> A. He was very good. He was clean cut, had just graduated from high school and, my recollection, was about to enter the air force. I did not see that in the record, but somewhere I have a notion he was about to enlist in the air force. But he was articulate and very definite in what he had to say. He was a good witness for the prosecution.
>
> Q. Were you aware prior to trial this witness had viewed photographs?
>
> A. No.

(Continued on following page)

albeit to a lesser degree, of Cobb's testimony.[26] But this is not the sort of prejudice of which a defendant justly may complain. Rather, he may justly complain only of undue and unfair prejudice—that is, that the harm done to his case would not have come about had his constitutional rights been strictly protected.

Footnote continued—

Q. When was this first brought to light?

A. During the course of cross examination, I believe.

Q. Did you make any attempt to determine whether or not the in-court identification was based on what he saw in the photographs or based on what he saw on the night of the crime?

A. I did. And his testimony was what he saw on the night of the crime.

Q. Were there any reasons for you to, for your declination to further pursue this issue of the in-court identification?

A. No. *Actually I wanted to get him out of the courtroom as quick as I could.*

Q. For what reason?

A. *Because he was too good a witness for the State.*

(Emphasis added.)

26. Cobb testified that he was standing in his backyard, looking for a set of lost keys, when he saw Cole and Washington walk by, search through some nearby honeysuckle bushes, and emerge carrying a shotgun and a money bag. This, of course, directly contradicted Washington's account of his whereabouts at 1:00 a.m. in the morning following the shooting, although it only circumstantially linked Washington to the crime.

Cobb testified that although he had been to a lounge earlier that evening, he had not had anything to drink, since he was on his college track team. He testified that although it was dark where he was standing, he could see Cole and Washington very clearly by the light of a streetlight, and that he had recognized Washington and had had a chance to look him over very thoroughly. Cobb denied having seen Washington since that time, and denied that the police had asked him to pick Washington out of a series of photographs.

Reeves developed through other witnesses, however, that Cobb had initially identified Johnny Washington's brother. R.L. Washington, as the man he had seen searching through the bushes with Cole; indeed, the police initially arrested R.L. Washington on the basis of Cobb's misidentification. Reeves stressed this misidentification to the jury in his closing argument in an attempt to impeach Cobb's testimony.

[11] Washington has suggested only one way[27] in which his trial might have been different had Reeves interviewed Hodo and Cobb: he suggests that Reeves would have filed a pretrial motion to suppress Hodo's and Cobb's in-court identifications on grounds that they were unduly suggestive under *Manson v. Brathwaite*, 432 U.S. 98, 97 S.Ct. 2243, 53 L.Ed.2d 140 (1977).[28] After examining the record,[29] however, we are satisfied that Washington has

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27. In what is essentially a derivative argument, Washington also suggests that because Reeves was surprised by the nature of Cobb's and Hodo's testimony, he was unprepared to probe their testimony through vigorous cross-examination for fear that he might unearth something worse. In fact, Reeves' cross-examination of both of these witnesses appears to have been quite skillful.

The short answer to Washington's argument, however, is that he has failed utterly even to allege—much less establish—that there was anything more for Reeves to establish through cross-examination. There simply does not seem to be anything more that Reeves could have done to discredit these witnesses' testimony. Particularly with respect to Hodo, Reeves can hardly be faulted for "wanting to get him out of the courtroom as quick as [he] could," for Hodo was indeed "too good a witness for the State."

28. *Manson* reemphasized that the factors which were first stated in *Neil v. Biggers*, 409 U.S. 188, 93 S.Ct. 375, 34 L.Ed.2d 401 (1972), are to be considered in determining whether under the "totality of the circumstances" an identification can be deemed sufficiently reliable to be admissible. 432 U.S. at 107 & n.9, 97 S.Ct. at 2249 & n.9. *Biggers* emphasized "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the trial and the confrontation." 409 U.S. at 199, 93 S.Ct. at 382.

"The *Biggers* components govern the admissibility of both in-court and out-of-court identification[s]." *United States v. Bazan*, 637 F.2d 363, 366 n.8 (5th Cir.), *cert. denied*, ... U.S. ....., 101 S.Ct. 2335, 68 L.Ed.2d 854 (1981). *See generally id.* at 365-67; *Meyer v. Estelle*, 621 F.2d 769, 774-75 (5th Cir. 1980); *Babers v. Estelle*, 616 F.2d 178, 180-81 (5th Cir.), *cert. denied*, ... U.S. ....., 101 S.Ct. 404, 66 L.Ed.2d 248 (1980).

29. Washington presumably could have called Cobb, Hodo, or both as witnesses at the habeas hearing in order to amplify upon the circumstances surrounding their identifications of Washington. He did not do so. As a result, virtually the only evidence about these identifications is that which Reeves developed through cross-examination at Washington's trial.

failed to establish that such a suppression motion would properly have been granted had it been made: under the totality of the circumstances, as developed by Reeves' cross-examination of Cobb[30] and Hodo[31] at trial, we cannot con-

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30. The only respects in which Washington challenges Cobb's identification of him have to do with the facts that Cobb was returning from a bar when he allegedly saw Cole and Washington; that it was dark; and that Cobb originally misidentified R.L. Washington, Johnny Washington's brother, as the man he had seen with Cole. Cobb's uncontradicted testimony at trial, however, established that there was adequate light and that Cobb had not been drinking. See note 26 *supra*.

We assume *arguendo* that there was something impermissibly suggestive in Cobb's confrontation with Washington that might have tainted his in-court identification, and that Washington therefore has met the first of this circuit's two requirements, *see e. g., Preacher v. Estelle*, 626 F.2d 1222, 1223 & n.3 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 1389, 67 L.Ed.2d 362 (1981), for suppressing an in-court identification. However, Washington has not met the second requirement by demonstrating that under the totality of the circumstances, a very substantial likelihood of misidentification existed *at the trial*. Only one of the *Biggers* factors—"the accuracy of the witness' prior description of the criminal"—cuts in favor of suppression. Based on Cobb's trial testimony all three of the other factors cut against suppression, and Washington has failed to supplement the trial record with any evidence to the contrary.

Therefore, we must conclude that Cobb's in-court identification of Washington, though perhaps rendered somewhat questionable by virtue of the prior misidentification, was merely part of the "customary grist for the jury mill. Juries are not so susceptible that they cannot measure intelligently the weight of identification testimony that has some questionable value." *Manson*, 432 U.S. at 116, 97 S.Ct. at 2254. As we observed above in note 26, Reeves competently brought to the jury's attention the respects in which Cobb's testimony was suspect.

31. Hodo testified on direct examination that he had seen Washington at a distance of seven feet. On cross-examination by Reeves, Hodo described in more detail the circumstances under which he had seen Washington:

Q. How long did you look at him?
A. About ten seconds.
Q. About ten seconds?
A. Yes sir.
Q. Now what was he doing?
A. He was walking.

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clude that there existed at trial the "very substantial likelihood of irreparable misidentification," *id.* at 116, 97 S.Ct.

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Q. He was walking?

A. He was running at first, and then he stopped. See, I saw him, you know, at the alley. It is a fence. I saw him running at first. And I got on in the middle of the alley. He stopped.

Q. And there was a light in there?

A. Yes sir.

Q. How long did you look at him?

A. About ten seconds.

Q. What did he have in his hand?

A. A gun.

Q. What did he have on?

A. I don't remember what he had on.

. . . .

Q. You can without question point out this man as being the man you saw for approximately ten seconds, if not in a completely dark, a darkish alley and that was a month ago?

A. Yes.

Q. You are positive?

A. I am positive.

In later questioning, Reeves established that Hodo had picked Washington out of an array of six or eight photographs in early April and again on the morning before trial. Reeves tried to get Hodo to admit that he had been influenced by the arrays:

Q. Let me ask you this: could looking at those photographs enable, having picked Johnny Washington twice in those photographs, are you identifying him now by reference to those photographs, or by what you saw in the alley?

A. What I saw in the alley.

Q. You are positive?

A. Yes.

At this point, Reeves concluded his cross-examination.

There is no suggestion from this record that the photographic arrays were unduly suggestive in the least. But even assuming that there was some impermissible suggestiveness inherent in the photo arrays, or in the circumstances surrounding the in-court identification, Hodo's uncontradicted testimony established his opportunity to view, his degree of attention, the accuracy of his description, the level of his certainty, and the relatively brief time between the crime and the actual confrontation. There is no question but that under the totality of the circumstances, there was not such a very substantial likelihood of misidentification as to render Hodo's in-court identification inadmissible.

at 2254, necessary before an in-court identification need be suppressed.

The law of our circuit is as yet unclear as to the precise *degree* of prejudice that a defendant must demonstrate before he is entitled to habeas corpus relief on grounds that he received ineffective assistance of counsel, although it is clear that *some* degree of prejudice must be shown.[32]

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32. Cases indicating that some degree of prejudice must be shown include *Beavers v. Balkcom*, 636 F.2d 114, 116 (5th Cir. 1981) (indicating that on remand petitioner would need to show how expert psychiatric assistance would have helped petitioners' case had counsel obtained it for trial); *Mendiola v. Estelle*, 635 F.2d 487, 491 (5th Cir. 1981) (denying relief in part because petitioner could show no prejudice from his appellate counsel's failure to raise certain grounds on appeal because petitioner himself had raised those grounds in a pro se brief); *Lovett v. Florida*, 627 F.2d 706, 709-10 (5th Cir. 1980) (denying relief on ineffective assistance claim when petitioner contended, without any substantiation, that had counsel arranged for handwriting analyses, they would have been exculpatory); *Buckelew v. United States*, 575 F.2d 515, 521 (5th Cir. 1978) (denying relief on ineffective assistance claim that was predicated on counsel's failure to call witness when petitioner failed even to allege how witness' testimony would have been helpful); *United States v. Doran*, 564 F.2d 1176, 1177-78 (5th Cir. 1977) (denying relief on ineffective assistance claim that was predicated on counsel's failure to locate and subpoena two witnesses because "[t]here has been no affirmative demonstration of prejudice"), *cert. denied*, 435 U.S. 928, 98 S.Ct. 1498, 55 L.Ed.2d 524 (1978); and *Pennington v. Beto*, 437 F.2d 1281, 1285 (5th Cir. 1971) (indicating that on remand, petitioner would need to establish both that uncalled witnesses were available to counsel and that their testimony would have been helpful to petitioner's case). *Accord, Cooper v. Fitzharris*, 586 F.2d 1325, 1331-33 (9th Cir. 1978) (en banc) (when an ineffective assistance claim is premised on specific acts or omissions of counsel, the allegations must be buttressed by a showing of injury or prejudice to the defendant), *cert. denied*, 440 U.S. 974, 99 S.Ct. 1542, 59 L.Ed.2d 793 (1979). *Cf. Gomez v. Beto*, 462 F.2d 596, 597 (5th Cir. 1972) (per curiam) (noting that since uncalled witnesses had testified at habeas hearing that they would have corroborated petitioner's alibi defense, petitioner had demonstrated prejudice from counsel's failure to investigate).

How much prejudice need be demonstrated appears to be as yet an open question. *Compare Davis v. Alabama*, 596 F.2d 1214, 1221-23 (5th Cir. 1979) (suggesting that "[n]ot every defendant whose attorney was deficient must show prejudice," but if so,

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We need not decide what degree of prejudice is necessary, however, for Washington has failed to demonstrate that

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Footnote continued—

a defendant "need only show that his attorneys' errors were not 'harmless beyond a reasonable doubt,' " citing *Chapman*), *vacated as moot*, 446 U.S. 903, 100 S.Ct. 1827, 64 L.Ed.2d 256 (1980); and *United States v. Decoster*, 624 F.2d 196, 290-95 (D.C. Cir. 1979) (en banc) (Bazelon, J., dissenting, joined by Wright, C.J.) (once petitioner has established his trial counsel's ineffectiveness, burden is on government to establish that error was harmless beyond a reasonable doubt), *with id.* at 208 & n.74 (plurality opinion of Leventhal, J., joined by three judges) ("the accused must bear the initial burden of demonstrating a likelihood that counsel's inadequacy affected the outcome of the trial"; thereafter, "the conviction cannot survive unless the government demonstrates that it is not tainted by the deficiency, and that in fact no prejudice resulted"; if showing by the accused causes the court serious misgivings notwithstanding the absence of a constitutional violation, government may prevail upon showing short of *Chapman* standard); and *id.* at 232 (MacKinnon, J., concurring, joined by two other judges) ("a defendant must show substantial unfair prejudice to his defense resulting from a substantial violation of duty owed him by his counsel," at which point the burden shifts to the government to rebut this showing).

We note, too, that numerous courts have held that no prejudice need be shown in those few instances in which an ineffective assistance claim is premised not on specific acts or omissions of counsel, but instead on the fact that "no counsel [was] provided, or counsel [was] prevented from discharging his normal functions." *E. g., Ewing v. Williams*, 596 F.2d 391, 395 (9th Cir. 1979). *Cf. Torna v. Wainwright*, 649 F.2d 290, 292 (5th Cir. 1981); *Perez v. Wainwright*, 640 F.2d 596, 598-99 (5th Cir. 1981) (both holding that when a defendant is denied an opportunity timely to appeal because of his counsel's failure to "perform his promise that an appeal would be taken, fairness requires that the deceived defendant be granted an out-of-time appeal"; since counsel's ineffectiveness wholly deprived the defendant of an appeal, the defendant need make no showing that an issue of arguable merit will be raised in the out-of-time appeal). The case at bar clearly does not present such a claim.

Nelson v. Estelle, 642 F.2d 903, 905 n.3 (5th Cir. 1981), expressly declined to decide whether a petitioner must demonstrate prejudice to prevail on an ineffective assistance of counsel claim. In that case, the alleged ineffectiveness stemmed from counsel's failure to object at trial to clearly inadmissible hearsay evidence. The *Nelson* court noted that erroneous evidentiary rulings by state courts may be grounds for federal habeas corpus relief only if the erroneously admitted evidence sapped the trial

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any prejudice whatsoever accrued from Reeves' failure to interview Hodo and Cobb prior to Washington's trial: given that Reeves would not have been able to suppress the in-court identifications of Washington even had he interviewed them prior to trial, we perceive no way in which Washington's trial would have differed had Reeves conducted such interviews.

[12] Washington also contends that Reeves "did not interview easily accessible witnesses [other than those listed on the prosecution's witness list] who could and eventually did undercut [Washington's] alibi defense." With respect to Reeves' failure to interview additional people who attended the party at which Washington claimed to have been at the time of the shooting,[33] the short answer to this argument is that Washington has utterly

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of fundamental fairness—*i. e.*, only if the error was " 'material in the sense of a crucial, critical, highly significant factor.' " *Id.* at 907-08 (quoting *Hills v. Henderson*, 529 F.2d 397, 401 (5th Cir.), *cert. denied*, 429 U.S. 850, 97 S.Ct. 139, 50 L.Ed.2d 124 (1976); *accord*, *Mendiola v. Estelle*, 635 F.2d 487, 491 (5th Cir. 1981)). Significantly, there was no showing in that case that the erroneously admitted hearsay was inaccurate or otherwise unreliable; thus, even though the petitioner had been "prejudiced" by the hearsay in the sense that its admission was detrimental to his case, that prejudice was not undue or unfair.

Accordingly, the *Nelson* court determined that the erroneously admitted evidence did not drain the state-court proceedings of fundamental fairness, 642 F.2d at 907-03, and declined to afford the petitioner greater protection through an ineffective assistance claim than that to which he would have been entitled had he challenged the admission of the hearsay directly. As an alternate ground for its holding, the *Nelson* court noted that it was not until two months after the petitioner's trial that the Texas Court of Criminal Appeals had held inadmissible the hearsay to which the petitioner claimed his counsel should have objected; the court repeated our familiar observation that "[c]lairvoyance is not a required attribute of effective representation." *Id.* at 908 (quoting *Cooks v. Wainwright*, 461 F.2d 530, 532 (5th Cir. 1972)).

33. Specifically, Washington alleges that Reeves failed to interview party-goers identified as Spencer Cotton, Glenda Cotton, Charles Hudgins, and "a girl called Tittie Boo."

failed to demonstrate that any of the party-goers other than the witnesses Reeves *did* call would have supported Washington's alibi. Our comments in *United States v. Guerra*, 628 F.2d 410, 413 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 1398, 67 L.Ed.2d 369 (1981), are apposite here:

> Complaints concerning uncalled witnesses [require] a heavy showing [by the petitioner] since the presentation of testimonial evidence is a matter of trial strategy and often allegations of what a witness would have testified to are largely speculative. . . . None of the alleged witnesses were called at the [federal habeas corpus] hearing and no one knows what they would have testified to. All we have is what [the petitioner] says they would have said.

Again, on this record, any inadequacy in Reeves' representation that is attributable to his failure to interview nontestifying party-goers must be deemed completely nonprejudicial to Washington, given his utter failure to establish at his federal habeas hearing that the nontestifying party-goers would have corroborated Washington's alibi defense.

This is also true with respect to those persons who contradicted Washington's alibi story, either as prosecution witnesses or as defense witnesses whose testimony surprised Reeves: there has been absolutely no showing that Reeves' failure to interview some of these witnesses,[34] or his failure

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34. Specifically, Washington alleges that Reeves failed to interview the following persons who were presented by the prosecution as rebuttal witnesses: James Albert Jones, who testified that "everybody that was at the party was in the living room" and that he never saw Washington there; Flora Toney, who lived in the apartment where the party was given and testified that she never saw Washington at the party during the time of the robbery; and Henry Moore, who testified that he was at the party the whole night but that he had not seen Washington there.

to interview others of them more thoroughly,[35] in any way prejudiced Washington's defense, despite Washington's clear opportunity to make such a showing at his federal habeas hearing.

Accordingly, we must reject Washington's contention that he should be granted federal habeas corpus relief on grounds that his counsel was constitutionally ineffective by virtue of his failure adequately to interview prospective and actual witnesses.

2. Reeves other asserted failings.—Washington contends that Reeves' assistance was constitutionally ineffective by virtue of his failure to investigate the apparent underrepresentation of blacks on the relevant jury panels, and by his failure to object to the court's and the prosecutor's systematic striking of all of the blacks who were on the panel. On this record, we harbor considerable doubt as to whether such challenges would properly have been sustained even had Reeves chosen to make them. However, while Reeves testified at the habeas hearing that he had considered arguing that blacks had been systematically excluded from the petit jury venire, he chose not to pursue this argument as a matter of trial strategy.[36] Given all of

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35. Specifically, Washington urges that Reeves should have more thoroughly interviewed witnesses Leroy Hill and Douglas Harrison, whose surprise testimony tended to undercut Washington's alibi defense.

36. In response to questioning from Washington's counsel at the habeas hearing, Reeves testified as follows:

> Q. . . . Did you investigate the jury venire to determine whether or not there was a systematic exclusion of black citizens from the jury?
>
> A. I did not.
>
> Q. Could you tell me why you did not?
>
> A. Several reasons. One, I had observed the jurors at that time for about eight years. I was personally familiar with a prior case that was, I believe, around 1975 in-

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the circumstances of this case, we cannot conclude that such a strategy was so ill-chosen that it made Reeves' overall representation constitutionally ineffective. Further, Reeves did object, without success, to the court's striking of black jurors who were excused for cause on grounds that they could not set aside their "sympathy." Reeves also testified that given his understanding of the law and of the facts of Washington's case, he saw no basis for a challenge to the prosecution's exercising its peremptory strikes against blacks.[37] We cannot conclude that Reeves' representation was inadequate in these regards.

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> volving black defendants charged with an attack on a white girl. The venires there were challenged. After investigation by the attorneys, . . . [they] withdrew their motion.
>
> Based on that, based on observing the number of blacks that are on juries, based on the fact that there were many competent attorneys that practice in Columbus court, none had ever made that challenge, and *I felt it was totally without merit.*

(Emphasis added.)

37. In response to questioning from Washington's counsel at the habeas hearing, Reeves testified as follows:

> Q. Now in your experience, in your observations in cases that you have tried *prior to the Washington case and after the Washington case,* has it been your experience that the District Attorney has in cases where the client has been black, the defendant has been black has used peremptory challenges to strike black jurors?
>
> A. Now I could only speak as to cases that I have tried.
>
> Q. That is all I am asking.
>
> A. *Sometimes he does and sometimes he doesn't.*
>
> Q. Would you say that is more of a pattern that he does or he doesn't? I believe we discussed this yesterday to some degree.
>
> A. To some degree. In a case of this nature, I think it would be his pattern to strike blacks as in my position I would be wanting to strike the whites.

(Emphasis added.) Later in the hearing, Reeves amplified upon this testimony:

> Q. . . . Now you earlier testified that the District Attorney, I believe, used out of twelve peremptory strikes ten strikes and those were blacks. Now the other two, if I am

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[13] Neither do we find merit in Washington's claim that Reeves' representation was inadequate because he

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Footnote continued—

not mistaken, one was a woman who voiced some objection to being able to give the death penalty, is that correct?

A. That is correct.

Q. And the other one was a minister?

A. A minister who also employed Johnny Washington's mother in the church.

Q. I see. And the judge didn't rule for cause on that one?

A. Not for cause.

Q. Did it occur to you to object to the District Attorney's striking black jurors as a matter of practice and tactics as you mentioned earlier?

A. No. As far as I understand the law, he has got twelve he can use for any reason. He is picking a jury that he hopes will convict.

Q. Okay. So your understanding of the law is then that if the District Attorney wishes to base his peremptory challenges totally on racial background?

A. Now, I am not looking into his mind because I don't know.

Q. I am asking your understanding of the law, that he can use or she can use those peremptory challenges for any reason that they desire as a trial tactic?

A. Yes. He can strike, he has that twelve that he can strike without giving a reason.

Q. Even if that reason is just purely race, he or she could still strike for that reason?

A. Well, now I don't want to get back into that circle. It is my understanding that he can strike twelve for whatever reason he desires, without giving a reason.

Reeves was certainly correct in his understanding that a prosecutor generally need not justify his use of peremptory strikes. Washington cites *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965), for the proposition that a defendant's constitutional rights may be infringed by a prosecutor's deliberate and continued exclusion of blacks from juries through the use of peremptory challenges. "But a defendant bears a heavy burden when he seeks to show systematic discrimination of constitutionally significant proportions. It is not enough to base such a constitutional claim on the facts of the single case presented to this court." *Easter v. Estelle*, 609 F.2d 756, 759 (5th Cir. 1980). It can hardly be contended that Reeves general, equivocal comments about the district attorney's "pattern" of striking blacks is sufficient to

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failed during voir dire examination to prove the venire members' racial attitudes. Reeves' testimony at the habeas hearing indicates that he made a conscious tactical decision not to expand on the trial court's and prosecutor's general questioning of the jury regarding their fairness and impartiality.[38] On this record, there is no reason to conclude that this strategy was ill-chosen; Reeves' representation was not inadequate in this respect.

Footnote continued—

establish that there has in fact been systematic exclusion of blacks from juries; indeed, Reeves' statement that "sometimes [the prosecutor] does [strike blacks] and sometimes he doesn't" would completely undercut such an argument.

Further, Reeves' observations about the district attorney's "pattern" were based on his experience both before and after Washington's trial; the record indicates, however, that Washington's was the first case Reeves had tried against this district attorney, who had been elected to the position only a short time before. There is no evidence in the record that would tend to establish that any other prosecutor in Columbus participated in such a "pattern" of systematic exclusion of blacks. Given that we must not evaluate counsel's effectiveness using hindsight, it is difficult in these circumstances to conceive how Reeves could be expected to have objected at Washington's trial to this prosecutor's "pattern" of striking blacks, if indeed such a pattern developed after Washington's trial.

38. In response to questioning from Washington's counsel at the habeas hearing, Reeves testified as follows:

> Q. [M]y reading of the record indicates that there were no questions asked either by the judge, by the defense, or by the prosecution other than a general question of whether you could be fair and impartial regarding, specifically regarding prejudice against black people.
>
> A. I would say one thing, if a person does feel that prejudice, he is not going to stand up and admit it. But when you ask him if he could give an impartial trial, he is either going to say yes or he is going to say no.
>
> Q. And specifically, if a person was asked whether or not they held any animosity or had any specific prejudices against blacks you didn't feel that was—
>
> A. No.
>
> Q. —that was important to ask. All right.

This clearly demonstrates that Reeves' decision not to pursue further the issue of racial prejudice was a considered tactical choice.

[14, 15] Washington also alleges that had Reeves spent more time consulting with him, Washington would have chosen not to pursue the alibi defense. Washington has failed, however, to suggest any viable defense that he might have pursued in its place,[39] and Reeves' efforts to

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39. Washington suggests that the prosecution's evidence—specifically, Roy Thompson's testimony that Woods repeatedly grabbed at the gunman's gun and followed him to the door—suggested a "provocation/accidental shooting" defense. This suggestion, however, ignores the fact that the statute under which Washington was convicted defines the killing of another human being as capital murder "[w]hen done *with or without any design to effect death*, by any person engaged in the commission of the crime of . . . robbery." Miss.Code Ann. § 97-3-19 (1980 Supp.) (emphasis added). The Mississippi Supreme Court's interpretation of this provision confirms that the defendant's specific intent to kill is irrelevant under this felony murder provision. *Culberson v. State*, 379 So.2d 499, 507-08 (Miss.1979) (en banc), *cert. denied*, ... U.S. ....., 101 S.Ct. 406, 66 L.Ed.2d 250 (1980); *Gray v. State*, 351 So.2d 1342, 1344-45 (Miss.1977) (en banc). Thus, any suggestion that Washington might profitably have urged that his shooting of Woods was excusable on provocation or self-defense grounds is frivolous. Further, as a general matter, "[a]ccident is, of course, no defense to a homicide committed in the perpetration of, or in the attempt to perpetrate, a felony." 40 Am.Jur.2d *Homicide* § 112, at 407 (1968). *See also* W. LaFave & A. Scott, Handbook on Criminal Law § 71, at 549-50 (1972). In short, under hornbook criminal law, these suggested "defenses" are inapplicable when the crime charged is felony murder.

In a separate argument, Washington contends that the Eighth and Fourteenth Amendments forbid imposition of the death penalty in the absence of a finding that Washington deliberately, purposely, or intentionally acted to take a human life, relying chiefly on Justice White's opinion in *Lockett v. Ohio*, 438 U.S. 586, 624-28, 98 S.Ct. 2954, 2983-85, 57 L.Ed.2d 973 (White, J., concurring in part and in the judgment, and dissenting in part). *See generally* Comment, *The Constitutionality of Imposing the Death Penalty for Felony Murder*, 15 Hous.L.Rev. 356 (1978). Given our holding below in part III-*E* of this opinion, we expressly decline to address this argument. We note, however, that this contention would relate only to the imposition of the death penalty—not to Washington's guilt or innocence—and at best could have left him facing a mandatory life sentence with no possibility of parole, *see* Miss.Code Ann. § 99-19-107 (1980 Supp.). Hence, it can hardly be argued that Reeves should have abandoned the alibi defense that was preferred by his client in favor of a constitutional argument that thus far has been accepted by only one of the Court's nine Justices, and that at best would have left his client in prison for life without possibility of parole.

strike a plea bargain with the prosecution were rebuffed. Reeves' testimony indicates that he conferred with Washington on five or six occasions prior to trial, and that they discussed the nature of the alibi defense in detail. We cannot conclude that Reeves failed adequately to consult with his client.

The final respect in which Washington contends that Reeves' representation was inadequate relates to his alleged failure adequately to prepare for the sentencing phase of Washington's trial. We need not reach this argument, however, because we conclude below in part III of this opinion that an error of constitutional dimensions in the sentencing phase of Washington's trial precludes the imposition of the death penalty. Reeves' alleged ineffectiveness in the sentencing phase of Washington's trial could not have infected the earlier determination as to Washington's guilt or innocence.

3. Our conclusions as to Washington's ineffective assistance of counsel claim.—In parts II-*C-1* and II-*C-2* of this opinion, *supra*, we have examined in some detail the specific respects in which Washington contends that his trial counsel provided constitutionally ineffective assistance. In each instance, we have concluded either that Reeves' actions were correct, or that they reflected conscious defense strategies that were not so ill-advised as to justify a conclusion that Reeves' assistance was made inadequate thereby, or that they were completely nonprejudicial to Washington's case.

[16] Yet we cannot emphasize too strongly that while this step-by-step method of analysis is, as an initial matter, necessary in order properly to evaluate an ineffective assistance of counsel claim, what is ultimately important is trial counsel's performance on balance and in the context of the entire case. Our repeated assertions that a criminal

defendant is not entitled to perfect or error-free counsel are not mere rhetoric. Given our analysis of each of the respects in which Washington contends that Reeves, representation was ineffective, the task of balancing the positive aspects of Reeves' representation against his shortcomings is easy to perform in this case: since in no single respect was his representation both inadequate and prejudicial to Washington's defense, there is no question but that on balance and in the context of the entire case, his representation of Washington was constitutionally adequate. Further, that the foregoing analysis of Reeves' effectiveness has concentrated solely on his alleged inadequacies should not obscure the fact that in many respects upon which we have not dwelt, his representation of Washington was far more than adequate.

III. THE LIMITATION ON THE JURY'S CONSIDERATION OF MITIGATING FACTORS IN THE SENTENCING PHASE OF WASHINGTON'S TRIAL

A. The Trial Court's Charge on Aggravating and Mitigating Factors

In the sentencing phase of Washington's trial, which followed immediately after the jury found Washington guilty of capital murder, counsel for the State presented evidence in aggravation and counsel for Washington presented evidence in mitigation. The trial court then, without objection from either side, instructed the jury in pertinent part as follows:

> Members of the jury, as the court explained to you in the beginning of the trial, you have heard some evidence in aggravation put on by the State and you have heard evidence in mitigation put on by the defendant. You must in your sentencing find at least one item present of aggravation before you could im-

pose the death penalty. If you find an item in aggravation present beyond a reasonable doubt, then you must consider any evidence in mitigation. And unless the evidence in mitigation could overcome the aggravation, of course, then you could return the death penalty. . . .

. . . .

You have found the defendant guity of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself. To return the death penalty you must find that the aggravating circumstances, those which tend to warrant the death penalty, outweigh the mitigating circumstances, which are those which tend to warrant the lesser [*sic*] severe penalty. *Now consider only the following elements of aggravation in determining whether the death penalty should be imposed:* One, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery. Two, the defendant Johnny Lewis Washington committed this capital murder in an especially heinous, atrocious, or cruel maner. Those are your elements of aggravation.

You must unanimously find beyond a reasonable doubt that one or more of these existed in order to return the death penalty. . . . Now if one or more of these elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. *Now consider the following elements of mitigation in determining whether the death penalty should*

> *not be imposed*: One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.
>
> If you unanimously find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found and you must return one of the following verdicts. . . .

(Emphasis added.) Washington argues that when taken as a whole, this charge operated to preclude the jury from considering as mitigating factors any of the circumstances surrounding his offense, and any aspects of his character and record other than his age and lack of a significant history of prior criminal activity. Washington contends that jury instructions which have this effect are impermissible under *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978).

B. Washington's Trial Counsel's Failure to Object to the Challenged Instruction

In its first responding argument, the State contends that because Washington's trial counsel expressly declined to voice an objection to this jury instruction, Washington's *Lockett* argument must be treated as having been waived under Mississippi's contemporaneous objection rule.[40] According to the State, this rule constitutes an independent and adequate state procedural ground that, under *Wainwright v. Sykes*, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594

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40. The State cites *Warren v. State*, 369 So.2d 483 (Miss.), *cert. denied*, 444 U.S. 956, 100 S.Ct. 436, 62 L.Ed.2d 328 (1979); *Evans v. State*, 315 So.2d 1 (Miss. 1975); and *Rayburn v. State*, 312 So.2d 454 (Miss. 1975), as support for the proposition that under Mississippi law, specific objections to jury instructions must be made at trial or the objection is waived.

(1977), bars our consideration on federal habeas corpus of Washington's *Lockett* claim.

[17] We find two flaws in the State's *Sykes* argument. First, the State did not contend in the district court that Washington's *Lockett* claim is barred by Mississippi's contemporaneous objection rule and *Sykes*. As such, the State itself is precluded from raising at this late date any claim that Washington should be barred under a state-law theory of procedural default, for "[a]s a general principle of appellate review, this court will not consider a legal issue or theory that was not presented to the [federal district court]." *Noritake v. M/V Hellenic Champion*, 627 F.2d 724, 732 (5th Cir. 1980). *See, e. g., Smith v. Estelle*, 602 F.2d 694, 708 n.19 (5th Cir. 1979) (State waived its *Sykes* argument by failing to raise it in the federal habeas hearing prior to its motion for new trial), *aff'd*, ... U.S. ....., 101 S.Ct. 1866, 68 L.Ed.2d 359 (1981); *LaRoche v. Wainwright*, 599 F.2d 722, 724 (5th Cir. 1979) (State waived its *Sykes* argument by failing to raise it in habeas proceedings in federal district court).

[18] The second and more fundamental flaw with the State's *Sykes* argument lies in the fact that the Mississippi Supreme Court expressly addressed the merits of Washington's *Lockett* claim in his direct appeal, rather than applying a contemporaneous objection rule to bar consideration of the merits. *See* 361 So.2d at 67-68. "[I]f neither the state legislature nor the state courts indicate that a federal constitutional claim is barred by some state procedural rule, a federal court implies no disrespect for the State by entertaining the claim." *County Court of Ulster County v. Allen*, 442 U.S. 140, 154, 99 S.Ct. 2213, 2223, 60 L.Ed.2d 777 (1979) (footnote omitted). Accordingly, the *Sykes* rule is inapplicable to Washington's *Lockett* claim despite his trial counsel's failure to object

to the relevant jury instructions. *E. g., Braxton v. Estelle*, 641 F.2d 392, 394 (5th Cir. 1981); *Holloway v. McElroy*, 632 F.2d 605, 617 (5th Cir. 1980), *cert. denied*, ... U.S. ....., 101 S.Ct. 3019, 69 L.Ed.2d ..... (1981).[41]

C. *The Standard by Which State-Court Trial Instructions are Judged on Federal Habeas Corpus*

When called upon, in the context of a habeas corpus action brought under 28 U.S.C. § 2254 (1976), to evaluate a jury instruction given by the state trial court, we must pay "careful attention to the words actually spoken to the jury, . . . for whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror could have interpreted the instruction." *Sandstrom v. Montana*, 442 U.S. 510, 514, 99 S.Ct. 2450, 2454, 61 L.Ed.2d 39 (1979); *see Holloway*, 632 F.2d at 620.

[19] To determine accurately the interpretation that a reasonable juror might give to the instruction in question, we cannot examine bits and pieces of the charge in isolation. *E. g., Cupp v. Naughten*, 414 U.S. 141, 146-47, 94 S.Ct. 396, 400-401, 38 L.Ed.2d 368 (1973). Rather, we must "examine the entire charge and determine whether, taken as a whole, the issues and law presented to the jury were adequate." *Davis v. McAllister*, 631 F.2d 1256, 1260 (5th

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41. Washington also suggests that he has demonstrated "cause" and "prejudice" sufficient to escape the *Sykes* rule because *Lockett* was not decided until more than one year after his trial and because any failure to object was the product of the inadvertence and ineffectiveness of his trial counsel. The precise contours of *Sykes*' "cause" and "prejudice" requirements should soon be clarified by the Supreme Court. *See Isaac v. Engle*, 646 F.2d 1129 (6th Cir. 1980) (en banc), *cert. granted*, ... U.S. ....., 101 S.Ct. 1973, 68 L.Ed.2d 294 (1981). In the meantime, we decline to add to the present uncertainty surrounding these requirements. *See generally Tyler v. Phelps*, 643 F.2d 1095, 1100-02 & nn. 8-9 (5th Cir. 1981) (on panel rehearing from 622 F.2d 172 (5th Cir. 1980)); *Holloway v. McElroy*, 632 F.2d at 617 n.23, and cases cited therein.

Cir. 1980). *See also Stephens v. Zant*, 631 F.2d 397, 405 (5th Cir. 1980), *modified on other grounds on panel rehearing*, 648 F.2d 446 (5th Cir. 1981) (reviewing instructions in habeas action challenging imposition of death penalty); *United States v. Brooks*, 611 F.2d 614, 619 (5th Cir. 1980).

And even when some deficiency is discovered in the language of the charge taken as a whole, "it must be established not merely that the instruction [was] undesirable, erroneous, or even 'universally condemned,' but that it violated some right which was guaranteed to the defendant by the Fourteenth Amendment," and that "the ailing instruction by itself so infected the entire trial that the resulting conviction voilates due process." *Cupp*, 414 U.S. at 146, 147, 94 S.Ct. at 400. *See also Bryan v. Wainwright*, 588 F.2d 1108, 1110-11 (5th Cir. 1979).

D. The Effect of the Challenged Instructions in This Case

Having determined that we are not barred from considering the merits of Washington's *Lockett* claim, we turn now to an evaluation of the practical effect of the jury nistructions—that is, what these instructions told the jury it should and should not do in deciding whether the death penalty should be imposed.[42] After reviewing the entire charge from the sentencing hearing, in addition to that particularly relevant portion quoted above in part III-*A* of this opinion, we must agree with Washington that a reasonable juror might well have believed that in determining whether any aggravating factors sufficiently outweighed any mitigating factors so as to warrant the imposition of the death penalty, it was his sworn duty to consider *only*

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42. In part III-*E* of this opinion, *infra*, we consider whether these effects violated Washington's constitutional rights.

the two mitigating factors specifically enumerated in the trial court's charge.

[20] We first note that *nowhere* in the trial court's charge to the jury in the sentencing phase of Washington's trial is there any explicit instruction that the jury was free to consider mitigating factors other than Washington's age and lack of a significant history of prior criminal activity. This, of course, is a very significant point in our determination as to whether a reasonable juror might well have believed that his sworn duty was to consider only those two mitigating factors; yet it is not conclusive, for we must look at the charge as a whole to see if other language therein would have led a reasonable juror to infer that he was not so bound.

It is true that the trial court prefaced its explanation of the jury's duty to balance aggravating and mitigating circumstances by pointing out that "[i]n reaching your decision you must obviously consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself." By itself, this language would tend to support an inference that the jury's discretion to consider both mitigating *and aggravating* circumstances was wholly unchanneled. This, of course, is not the law, and the remainder of the instruction was obviously calculated to negate any such inference.

In instructing the jury as to the two aggravating factors that were at issue in the case,[43] the trial court quite properly made it clear to the jury that it could consider *only* those two aggravating factors, and no others: "Now *consider only the following elements of aggravation* in de-

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43. The trial court's charge on these two aggravating circumstances was authorized by Miss. Code Ann. §§ 99-19-101(5)(d), (h) (1980 Supp.).

termining whether the death penalty should be imposed . . . ." (Emphasis added.) Almost immediately thereafter, in language that almost exactly paralleled that in which the trial court circumscribed the jury's consideration of aggravating factors, the court told the jury to consider the two statutorily prescribed[44] mitigating factors that were at issue in the case: "Now *consider the following elements of mitigation* in determining whether the death penalty should not be imposed . . . ." (Emphasis added.) Unquestionably, a reasonable juror might well infer from this parallel syntax that the enumerated factors—both aggravating and mitigating—were the sole factors that he was permitted to consider in the discharge of his oath. This inference would be further supported by the trial court's elaboration on the juror's duty to balance aggravating against mitigating factors: "If you find from the testimony that *one or more of the preceding elements of mitigation* exist[s], then you must consider whether *it* outweighs the aggravating circumstances you previously found . . . ." (Emphasis added.)

The State suggests that, to the contrary, the omission of the word "only" from the instruction as to mitigating circumstances would lead a reasonable juror to infer that his consideration of mitigating factors was not limited to those announced by the trial court. Perhaps an extraordinarily attentive juror might rationally have drawn such an inference from the omission of this single word. Indeed, such narrow parsing of language is far from unknown in the related context of judicial interpretation of

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44. The trial court's charge on these two mitigating circumstances was authorized by Miss. Code Ann. §§ 99-19-101(6)(a), (g) (1980 Supp.).

legislative pronouncements.[45] Nonetheless, at best the State's argument suggests that there is more than one reasonable interpretation of the crucial language in the charge; this does not mean the charge is not constitutionally infirm, for the Supreme Court has held that "whether a defendant has been accorded his constitutional rights depends upon the way in which a reasonable juror *could* have interpreted the instruction." *Sandstrom*, 442 U.S. at 514, 99 S.Ct. at 2454 (emphasis added).[46]

Accordingly, we must conclude that a reasonable juror might well have been led to believe from the trial court's charge that in determining whether the aggravating factors sufficiently outweighed the mitigating factors so as to warrant the imposition of the death penalty, it was his sworn

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45. In *Lockett*, for example, the plurality opinion pointed out that although "the Florida statute approved in *Proffitt* [*v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 916 (1976),] contained a list of mitigating factors, six Members of this Court assumed, in approving the statute, that the range of mitigating factors listed in the statute was not exclusive." 438 U.S. at 606, 98 S.Ct. at 2965. This assumption, according to the *Lockett* plurality, had been based on the fact that "the Florida statute 'provides that "[a]ggravating circumstances shall be limited to . . . [eight specified factors]" ' and that there was 'no such limiting language in the list of statutory mitigating factors.' " 438 U.S. at 606 & n.15, 98 S.Ct. at 2966 & n.15 (quoting *Proffitt*, 428 U.S. at 250 n.8, 96 S.Ct at 2965-66 n.8; emphasis, elipsis, and bracketed portion by *Proffitt* Court).

In *Spinkellink v. Wainwright*, 578 F.2d at 582, 620-21 (1978), *cert. denied*, 440 U.S. 976, 99 S.Ct. 1548, 59 L.Ed.2d 796 (1979), we relied on the *Lockett* Court's analysis of its earlier discussion of the Florida statute in *Proffitt* in rejecting a *Lockett* attack on that statute. We also noted that Spinkellink "was afforded, and exercised, without limitation, every opportunity to set forth any and all mitigating factors in his favor," including nonstatutory mitigating factors such as provocation. *Id.* at 621. Apparently, Spinkellink did not contend that the trial court's charge impermissibly limited the jury's *consideration* of those nonstatutory mitigating factors. Accordingly, *Spinkellink* has no direct bearing on the case at bar.

46. This would seem to be especially true in a capital case, given the degree of precision required in channeling the jury's sentencing discretion. See part III-*E* of this opinion, *infra*.

duty to consider *only* the two mitigating factors specifically enumerated in the charge. We now must explore the legal ramifications of this conclusion.

E. The Merits of Washington's Lockett Claim

1. The Lockett decision.—In the three years since the Supreme Court decided *Lockett v. Ohio*, 438 U.S. 586, 98 S.Ct. 2954, 57 L.Ed.2d 973 (1978), there have been surprisingly few occasions for the Court or the lower federal courts to amplify upon that precedent. In evaluating Washington's *Lockett* claim, therefore, we must be guided for the most part by that decision alone, although we may profitably draw much from the surrounding context of the Court's prior and subsequent pronouncements on the subject of capital punishment.

An Ohio jury convicted 21-year-old Sandra Lockett of capital murder for her role in the armed robbery of a pawnshop.[47] Under then-current Ohio law, Lockett was to receive a sentence of death unless the trial judge found by a preponderance of the evidence one of three statutory mitigating circumstances: that the victim induced or facilitated the murder; that the defendant acted under duress, coercion, or strong provocation; or that the offense was primarily the product of psychosis or mental deficiency insufficient to constitute legal insanity. Lockett introduced evidence relating to her character and history (*e. g.*, her youth, good character, lack of a prior record of violent crime, and excellent prospects for rehabilitation) and the circumstances of the offense (*e. g.*, that she had had no

47. Lockett had remained outside while accomplices entered and robbed the pawnshop, and hence was not present at the actual shooting. Nonetheless, Ohio's statutory felony murder rule and aiding and abetting statute permitted the jury to find intent to kill on the part of an accomplice who had taken any part in a life-threatening crime.

part in the actual killing and only a minor role in the robbery, and that the shooting appeared to have been accidental); she argued that these factors made the death penalty inappropriate. The trial judge, however, found that none of the statutory mitigating circumstances was present, and sentenced Lockett to death. The conviction and sentence were upheld by the Ohio Supreme Court. The United States Supreme Court reversed Lockett's death sentence, holding that the Ohio death penalty statute was unconstitutional under the Eighth and Fourteenth Amendments.

Although recognizing that the signals sent by the Court's recent death penalty cases had not "always been easy to decipher," 438 U.S. at 602, 98 S.Ct. at 2963, Chief Justice Burger's plurality opinion began by reviewing the plurality opinions of the Court's 1976 death penalty cases.[48] The Chief Justice discerned from those cases an intent that sentencing discretion in death penalty cases not be eliminated altogether, but only " 'directed and limited' . . . so that the death penalty would be imposed in a more consistent and rational manner and so that there would be a 'meaningful basis for distinguishing the . . . cases in which it is imposed from . . . the many cases in which it is not.' " *Id.* at 601, 98 S.Ct. 2963 (quoting *Gregg v. Georgia*, 428 U.S. 153, 189, 188, 96 S.Ct. 2909, 2931, 2932, 49 L.Ed.2d 859 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

The Chief Justice stressed, however, that the plurality in the 1976 cases had recognized "that the sentencing process must permit consideration of the 'character and

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48. *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 916 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of the process of inflicting the penalty of death,' . . . in order to ensure the reliability, under the Eighth Amendment standards, of the determination that 'death is the appropriate punishment in a specific case.' " *Id.* (quoting *Woodson v. North Carolina*, 428 U.S. 280, 304, 305, 96 S.Ct. 2978, 2991, 2992, 49 L.Ed.2d 944 (1976) (opinion of Stewart, Powell, and Stevens, JJ.)).

Continuing, the Chief Justice reiterated that the "qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Id.* at 604, 98 S.Ct. at 2964. "Given that the imposition of death by public authority is so profoundly different from all other penalties," the Chief Justice found that he could not "avoid the conclusion that an individualized decision is essential in capital cases." *Id.* at 605, 98 S.Ct. at 2965.

> There is no perfect procedure for deciding in which cases governmental authority should be used to impose death. But a statute that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. When the choice is between life and death, that risk is unacceptable and incompatible with the commands of the Eighth and Fourteenth Amendments.

Id.[49] Accordingly, Chief Justice Burger concluded that

> the Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor,* any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."

Id. at 604, 98 S.Ct. at 2964 (emphasis in original).[50] Applying this holding, the Chief Justice observed that the Ohio statute at issue allowed the sentencing authority to consider the nature and circumstances of the offense and the history, character, and conditions of the offender—but only to the extent that evidence of these factors had a bearing on the three narrowly defined statutory mitigating circumstances. *Id.* at 608, 98 S.Ct. at 2966. Because "[t]o meet consitutional requirements, a death penalty statute must not preclude consideration of relevant mitigating factors," *id.*, Chief Justice Burger concluded that the statute was incompatible with the Eighth and Fourteenth Amendments.

[21] Only Justices Stewart, Powell, and Stevens joined in the Chief Justice's opinion in *Lockett.* In one of the two occasions on which this court has construed *Lockett,* however, we noted that it would seem that "a death sentence imposed by a sentencer barred from considering mitigating circumstances will be vacated by a six-

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49. This paragraph was quoted with approval in Justice Stevens' opinion for a majority of the Court in *Beck v. Alabama,* 447 U.S. 625, 638 n.13, 100 S.Ct. 2382, 2389-90 n.13, 65 L.Ed.2d 392 (1980).

50. The Chief Justice "express[ed] no opinion as to whether the need to deter certain kinds of homicide would justify a mandatory death sentence as, for example, when a prisoner—or escapee—under a life sentence is found guilty of murder." 438 U.S. at 604 n.11, 98 S.Ct. at 2964-65 n.11.

member majority of the Supreme Court." *Chenault v. Stynchcombe*, 581 F.2d 444, 448 (5th Cir. 1978).[51] Accordingly, for present purposes we must treat the Chief Justice's plurality opinion as if it represents the views of a majority of the Court.[52]

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51. We noted in *Chenault* that although Justice Marshall continued in *Lockett* to adhere to his view that capital punishment is always unconstitutional, he "appears to have suggested that the sentencer must be allowed to consider 'the unique individuality of every criminal defendant.'" 581 F.2d at 447 (quoting *Lockett*, 438 U.S. at 621, 98 S.Ct. at 2973 (Marshall, J., concurring in the judgment)). We noted, too, that while Justice Brennan did not participate in either *Lockett* or a companion case decided on the basis of *Lockett* (*Bell v. Ohio*, 438 U.S. 637, 98 S.Ct. 2977, 57 L.Ed.2d 1010 (1978)), he has consistently maintained that the death penalty is always unconstitutional. 581 F.2d at 448.

Further, Justice Blackmun's concurring opinion in *Lockett* asserted that the State had to allow the sentencer to consider a defendant's noninvolvement in the actual killing and the degree of his mens rea—a partial embrace of the Chief Justice's position. *See* 438 U.S. at 613-17, 98 S.Ct. at 2969-2971 (Blackmun, J., concurring in part and concurring in the judgment). Only Justices White and Rehnquist expressly rejected the Chief Justice's reasoning, although Justice White found other constitutional flaws in the statute (see note 39 *supra*) that required that Lockett's sentence be vacated. *See* 438 U.S. at 622-24, 98 S.Ct. at 2982-83 (White, J., concurring in part, dissenting in part, and concurring in the judgment); *id.* at 628-33, 98 S.Ct. at 2973-76 (Rehnquist, J., concurring in part and dissenting in part). *See also* Hertz & Weisberg. *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Consideration of Mitigating Circumstances*, 69 Cal.L.Rev. 317, 325 n.43 (1981).

Thus, even discounting Justice Stewart's recent resignation from the Court, it would appear that a majority of the Justices would condemn on one or another ground a death sentence imposed in violation of the plurality opinion in *Lockett*.

52. As the commentators have noted, however, "[t]he *Lockett* Court's discussion of [the defendant's right to have the sentencing authority "consider" any proffered aspect of his character, record, or offense] is all too brief, and leaves its application . . . unclear. The decision merely announces the existence of the requirement and applies it to the facts of the case." Herts & Weisberg, *supra* note 51, at 326. Neither have the later decisions of the Court shed any further light on the *Lockett* independent mitigating weight requirement. *See id.* at 326-27 & n.51.

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2. Lockett's application to the case at bar.—Given our holding above in part III-*D* of this opinion, we must agree with Washington that the challenged jury instructions prevented the sentencer's consideration of nonstatutory mitigating factors in essentially the same manner as did the Ohio statute struck down by the *Lockett* court. Washington's sentencer was precluded from considering as mitigating factors all but two of the aspects of Washington's character and record and the circumstances of the offense that he proffered as a basis of a sentence less than death. Unless there is some meaningful distinction between Washington's case and that of Sandra Lockett, then, Washington's sentence of death cannot stand.

The most obvious difference between *Lockett* and the case at bar lies in the fact that Washington does not challenge on *Lockett* grounds the facial constitutionality of the state death penalty statute under which he was convicted.[53]

Footnote continued—

Hertz and Weisberg, however, argue persuasively that the *Lockett* rule is well grounded in the 1976 plurality opinions. Insofar as it requires that a jury, as a significant and objective index of contemporary community values, give individualized consideration to any mitigating factors that relate to the defendant before it, the *Lockett* rule serves to protect two related values that were emphasized in those opinions: (1) It ensures that an individual death sentence is consistent with public attitudes and evolving standards of decency. (2) It ensures that capital defendants are treated as unique human beings, with appropriate consideration given to whether imposition of the death penalty in the particular case would further the retributive and deterrent values in whose absence capital punishment would not comport with the dignity of man. *See id.* at 333-37.

53. In Washington's direct appeal, the Mississippi Supreme Court apparently treated Washington's *Lockett* arguments as a challenge both to the statute and to the jury instructions in his case. The court interpreted Miss.Code Ann. § 99-19-101(1) (1980 Supp.) to mean that "the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be *reasonably relevant.*" 361 So.2d at 65 (emphasis in original). While the court discussed the instructions given by the trial court at Washington's trial, however, it did not directly rebut

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His challenge is a far more narrow one, reaching only the particular jury instructions given in his case. Nonetheless, we conclude that this distinction does not undercut Washington's argument.

[22] The Supreme Court has repeatedly emphasized the importance of proper jury instructions in capital cases:

> Explaining that sentencer awareness of comprehensive, accurate information about the defendant is essential to a reliable and individualized sentencing determination [*see Jurek v. Texas*, 428 U.S. 262, 271 [96 S.Ct. 2950, 2956, 49 L.Ed.2d 929] (1976); *Gregg*, 428 U.S. at 189-92, 96 S.Ct. at 2932-34], the plurality [in the 1976 cases] observed that merely providing the jury with the evidence may not be sufficient, since jurors have little experience in sentencing and are unskilled in absorbing and applying sentencing information. [*Gregg*, 428 U.S. at 192, 96 S.Ct. at 2934]. The jury must therefore receive "guidance in its decisionmaking," particularly as to the types of factors that are relevant to the sentencing decision and the proper means for applying these factors to the determination of sentence. [*Id.* at 192-93, 195, 96 S.Ct. at 2934, 2935.] The plurality concluded that jury instructions are an indispensible mechanism for providing this type of guidance to a capital sentencing jury. [*Id.* at 193-95, 96 S.Ct. at 2934-35.]

Hertz & Weisberg, *In Mitigation of the Penalty of Death: Lockett v. Ohio and the Capital Defendant's Right to Con-*

Footnote continued—

Washington's argument that the jury instructions in his case had precluded the jury's consideration of nonstatutory mitigating factors.

We emphasize that we express no views whatsoever as to whether the Mississippi death penalty statute is in any way facially deficient under *Lockett*.

sideration of Mitigating Circumstances, 69 Cal.L.Rev. 317, 344 (1981) (footnotes omitted). And the *Lockett* plurality did not restrict its holding to statutes. Rather, it first announced a general rule—that "the sentencer . . . [must] not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death," 438 U.S. at 604, 98 S.Ct. at 2964—and then applied that rule to the Ohio statute, *id.* at 606-08, 98 S.Ct. at 2965-67. Accordingly, we recognized in *Chenault v. Stynchcombe*, 581 F.2d at 448, that *Lockett* "mandate[s] that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death," for *Lockett's* "constitutional requirement to allow consideration of mitigating circumstances would have no importance, of course, if the sentencing jury is unaware of what it may consider in reaching its decision."[54] Thus, there is no doubt but that Wash-

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54. The constitutional requirement that juries be given instructions detailing their discretionary power to refuse to impose the death penalty stands in sharp contrast to the prevailing law on the topic of "jury nullification"—that is, the jury's exercise of its "power to bring in a verdict [of acquittal] in the teeth of both law and facts." *Horning v. District of Columbia*, 254 U.S. 135, 138, 41 S.Ct. 53, 54, 65 L.Ed. 185 (1920) (per Holmes, J.). A jury, acting as a "community conscience" in disregarding the strict requirements of the law when it finds that those requirements cannot justly be applied in a particular case, undoubtedly possesses this power each time it determines a defendant's guilt or innocence; that power, of course, is not limited to capital cases, but extends to determinations of guilt or innocence in all criminal cases. The courts that have considered the question, however, have almost uniformly held that a criminal defendant is not entitled to an instruction that points up the existence of that practical power to his jury. *Compare United States v. Dougherty*, 473 F.2d 1113, 1130-37 (D.C.Cir.1972) (eloquent explanation of why a defendant is not entitled to instruction on jury nullification), *with id.* at 1139-44 (Bazelon, C. J., concurring in part and dissenting in part) (eloquent argument as to why a defendant should be entitled to such an instruction, or at least to argue the theory of jury nullification to the jury). *See also United States v. Wiley*, 503 F.2d 106, 107 & n.4 (8th Cir. 1974) (surveying the

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ington may properly raise his *Lockett* argument through a challenge to the instructions given by the trial court to the jury that convicted him.[55]

[23] In rejecting Washington's *Lockett* argument, the district court noted that the trial court excluded no evidence that was offered in mitigation, and concluded that "the jury was free to consider all mitigating evidence which [Washington] saw fit to offer." Similarly, the State argues that Washington's counsel introduced some evidence of nonstatutory mitigating factors, and adverted to those factors in his closing argument. Both the district court's analysis and the State's argument on appeal, however, completely miss the point of the Supreme Court's holding in *Lockett*. Sandra Lockett also introduced evidence of nonstatutory mitigating factors, and also argued their relevance to the sentencer. The fatal flaw in *Lockett* was not the exclusion of evidence relating to nonstatutory mitigating factors, but the limitation on the sentencer's

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Footnote continued—

federal court cases supporting its holding that defendant not entitled to jury nullification instruction).

Jury nullification, of course, goes to the question of whether a defendant will, on the one hand, be found guilty and be punished according to the strict dictates of the law, or, on the other, be forever free from *any* legal consequences of his criminal act. By marked contrast, when a jury declines to impose the death penalty upon one already convicted of a capital crime, the jury's exercise of community conscience and norms ordinarily will not result in the defendant being set free. In Mississippi, for example, the jury's sentencing alternatives for a capital offense are limited solely to capital punishment and life imprisonment. *See* Miss. Code Ann. §§ 99-19-101(2), 99-19-103 (1980 Supp.).

55. The State wisely concedes this point in its brief: "We concur with petitioner that an instruction emanating from the lips and pen of the trial court could inflict the same fatal trauma that the Ohio statute inflicted in *Lockett*. Any substantial judicial restraint imposed upon the sentencing authority would appear to be no less decisive on the Eighth Amendment question than a statutory impediment."

consideration of that evidence except as it related to the statutory mitigating factors.

Neither should Washington's *Lockett* challenge fail because his counsel adverted to nonstatutory mitigating circumstances during closing argument. As the Supreme Court has noted in a related context, "arguments of counsel cannot substitute for instructions by the court." *Taylor v. Kentucky*, 436 U.S. 478, 488-89, 98 S.Ct. 1930, 1936-37, 56 L.Ed.2d 468 (1978) (concluding that trial court's omission of instruction on presumption of innocence was not remedied by defense counsel's explanation of the presumption in opening and closing argument). Only an instruction from the trial court can invest a particular concept—here the jury's ability to consider nonstatutory mitigating factors—with the authority of the court. *See id.* at 489, 98 S.Ct. at 1936-37. Indeed, were a jury to consider nonstatutory mitigating factors despite instructions by the court to the effect that it was duty-bound to consider only the two statutory mitigating circumstances, it would be acting "lawlessly," *see Woodson v. North Carolina*, 428 U.S. at 303, 96 S.Ct. at 2990 (opinion of Stewart, Powell, and Stevens). "There is an element of capriciousness in making the jurors' power to avoid the death penalty dependent on their willingness to accept [an] invitation to disregard the trial judge's instructions." *Roberts v. Louisiana*, 428 U.S. 325, 335, 96 S.Ct. 3001, 3007, 49 L.Ed.2d 974 (1976) (opinion of Stewart, Powell, and Stevens).

The State also contends that the nonstatutory mitigating circumstances which Washington argues were removed from the jury's consideration "were not reasonably likely to generate any sympathetic consideration from the tribunal." The State argues that "the fact that [Washington] had carried on a 'steady domestic relationship' with a woman not his wife and had fathered, by her, a three year

old female child is not altogether an ironclad or otherwise viable mitigating factor bespeaking [Washington's] good moral character." Further, the State argues that evidence indicating that Washington had held no fewer than eight different jobs would have impelled the jury to the same conclusion that was reached by the trial judge in his post-sentencing report—that "the defendant had a poor work record."

This argument, however, goes to the *weight* that the jury would have accorded to the nonstatutory mitigating factors, rather than to whether the jury could properly have considered them in its calculations. The jury could just as easily have reached diametrically opposite conclusions from those suggested by the State, had it been allowed by the trial court's instructions to consider nonstatutory mitigating factors. For example, the jury might rationally have concluded that the two statutory mitigating circumstances (Washington's relative youth and lack of a significant record of prior criminal activity), when combined with various objective, articulable nonstatutory mitigating circumstances[56] (such as Washington's steady domestic relationship, his role as a father, and his employment history[57]), *together* sufficiently outweighed the ag-

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56. The State argues that two of the nonstatutory mitigating factors upon which Washington premises his argument—that Washington's child and girlfriend depended upon him for financial and other support, and that the shooting was not deliberate or intentional because the victim repeatedly grabbed for Washington's gun and moved threateningly toward him just prior to the shooting—are not supported by the record. Specifically, the State contends that the record contains no evidence that Washington's child and girlfriend were dependent upon him, and that, because of a peculiarity in the trial court's charge in the guilt phase of the trial, the jury's verdict conclusively established that Washington acted willfully with premeditated and deliberate design. Given our disposition above, we need not reach these contentions.

57. Equally as important may be the jury's subjective, unarticulable perceptions of Washington. In their separate opinions in *Lockett*, Justices White and Rehnquist argued that the plurality

(Continued on following page)

gravating circumstances so as to make life imprisonment a more appropriate and just punishment for Washington's crime than death.

Footnote continued—

was returning to the unguided jury discretion condemned in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972). *See* 438 U.S. at 622-23, 98 S.Ct. at 2982-83 (White, J., concurring in part and in the judgment and dissenting in part); *id.* at 631, 98 S.Ct. at 2974-75 (Rehnquist, J., concurring in part and dissenting in part). Some commentators have concluded from *Lockett* that "[t]he concern with capriciousness, the worry that when most offenders receive mercy the condemned few will die senselessly, no longer figures significantly in the Court's decisions." *The Supreme Court, 1977 Term;* 92 Harv.L.Rev. 57, 106-07 (1978).

However, the *Gregg* plurality was careful to note that "[n]othing in any of our [death penalty cases] suggests that the decision to afford an individual defendant mercy violates the Constitution." 428 U.S. at 199, 96 S.Ct. at 2937. The exercise of mercy, of course, can never be a wholly rational, calculated, and logical process. From these premises, other commentators have argued that "*Lockett* is entirely consistent with *Furman* and the 1976 Cases, because it grants broad sentencer discretion only on the mitigating and not on the aggravating side of the sentencing equation." Hertz & Weisberg, *supra* note 51, at 374. To amplify:

> The *Gregg* decision essentially holds that the state cannot execute a defendant unless it establishes, according to constitutionally sufficient criteria of aggravation and according to constitutionally mandated procedures, that capital punishment is appropriate for that defendant. Nothing in *Gregg*, however, requires the state to execute defendants for whom such a finding is made. The sentencing authority can find that mitigating circumstances established by defense evidence outweigh such aggravating factors. It can also invoke whatever standards it wishes—objective or otherwise—to nullify the significance of any state proof of aggravation.

Id. at 375 (footnote omitted). In this view, *Lockett* does indeed create an asymmetry in the channeling of jury sentencing discretion. That asymmetry is offensive, however, only if one assumes that the grant of mercy to some, based on their particularized circumstances, somehow abridges the constitutional rights of others whose particular circumstances do not inspire mercy. It may well be that the *Lockett* plurality does not share that assumption with Justices White and Rehnquist.

In the case at bar, we need not decide whether the *Lockett* rule applies when there are no objective, articulable nonstatutory mitigating factors. The factors that Washington *has* articulated are sufficient to make further inquiry along these lines unnecessary.

In short, under *Lockett*, the error in the trial court's proscription of jury consideration of nonstatutory mitigating circumstances was one of constitutional proportions that violated rights secured to Washington under the Eighth and Fourteenth Amendments; given that the entire purpose of the sentencing proceedings was to determine and balance aggravating against mitigating circumstances, that error unquestionably so infected the sentencing proceedings as to drain them of fundamental fairness. While one may argue about the precise degree to which Washington was prejudiced by this error, we cannot conclude that it was harmless beyond a reasonable doubt under *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).[58] Accordingly, the State may not constitutionally impose upon Washington a sentence of death on the basis of the sentencing proceedings at issue in this case.

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58. We cannot agree with the State's suggestion that before a habeas petitioner is entitled to prevail on *Lockett* grounds, the mitigating factors excluded from the jury's consideration must be as compelling as those excluded from jury consideration in *Green v. Georgia*, 442 U.S. 95, 99 S.Ct. 2150, 60 L.Ed.2d 738 (1979) (per curiam), which represents one of the Supreme Court's few applications of the *Lockett* rule. In *Green*, Georgia's hearsay rule resulted in the exclusion of hearsay testimony in which the out-of-court declarant, who was an accomplice of Green's, had said that Green was not present at and had not participated in the victim's death.

Relying on both *Lockett* and *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S.Ct. 1038, 1049, 35 L.Ed.2d 297 (1973) ("the hearsay rule may not be applied mechanistically to defeat the ends of justice"), the Supreme Court reversed Green's conviction with only one paragraph of analysis. The Court appeared to base its decision solely on the facts that the excluded testimony was highly relevant under *Lockett* and that substantial reasons existed to assume its reliability. *See* 442 U.S. at 97, 99 S.Ct. at 2152. We find no support in *Green* for the State's suggestion that *Lockett* applies only when the nonstatutory mitigating factors that have been excluded from jury consideration are especially compelling; neither does *Green* indicate that *Lockett* is limited to those situations in which defense counsel has been precluded from even alluding to the nonstatutory mitigating factors. As the Court's brief treatment indicates, the facts in *Green* simply indicated a more egregious violation of the *Lockett* rule than the facts of *Lockett* itself.

The practical impact of our holding should be relatively narrow. Counsel for the State indicated in argument in the court below that he has recommended to Mississippi prosecutors that they ensure that the jury instructions in capital cases do not limit the jury's consideration to statutory mitigating circumstances.[59] The use of such nonlimiting instructions has been approved by the Mississippi Supreme Court subsequent to Washington's trial and direct appeal. *See Gray v. State*, 375 So.2d 994, 1003-04 (Miss. 1979) (en banc) (approving instruction that jury was to consider as a mitigating circumstance "[a]ny other matter [besides the statutory mitigating circumstances] brought before you which you deem to be mitigating on behalf of the Defendant"), *cert. denied*, 446 U.S. 988, 100 S.Ct. 2975, 64 L.Ed.2d 847 (1980). And, of course, whether a given set of instructions operates so as to preclude the jury's consideration of nonstatutory mitigating factors will depend on how a reasonable juror could have interpreted the language of that specific charge.

Finally, it bears emphasis that we do not here decide whether constitutional error would inhere in a trial court's failure specifically to instruct the jury in a capital case that it was free to consider nonstatutory mitigating fac-

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59. In response to questioning from the court below as to whether the Constitution requires that the trial court's charge in a capital case specifically instruct the jury that it may consider nonstatutory mitigating factors, counsel for the State responded as follows:

> I don't think that is a constitutional necessity. I have advocated all along, or have been of the belief all along that it would not be unwise for the prosecutors or state to submit an instruction, mitigating circumstances you may consider, something to this effect or consider the following mitigating circumstances and then list the ones that have been brought out by the evidence and *add another one to the effect of other mitigating circumstances that you, the jury, feel may be reasonably relevant to the issue of life or death.*

(Emphasis added.)

tors;[60] our holding is limited to the circumstances of the case at bar, in which the trial court's charge was not silent on the issue, but operated affirmatively to preclude jury consideration of nonstatutory mitigating factors.[61]

IV. CONCLUSION

For the reasons set forth above in part II of this opinion, we conclude that Washington was not denied effective assistance of counsel in the guilt phase of his trial. Accordingly, we affirm the district court's judgment insofar as it declined to grant habeas relief that would have resulted in Washington's retrial on the issue of his guilt or innocence.

For the reasons set forth above in part III of this opinion, however, we conclude that the process by which the State secured a death sentence for Washington's crime was constitutionally flawed because the jury was precluded from considering nonstatutory mitigating factors in

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60. It is true that in *Chenault v. Stynchcombe*, 581 F.2d 441, 448 (5th Cir. 1978), we stated that "[w]e read *Lockett* and *Bell*, then, to mandate that the judge clearly instruct the jury about mitigating circumstances and the option to recommend against death." Nonetheless, that case did not present the question of whether constitutional error would inhere in a trial court's failure specifically to instruct the jury in a capital case that it could consider nonstatutory mitigating factors; in fact, the above-quoted language in *Chenault* does not directly refer to nonstatutory mitigating factors. Accordingly, this question must be considered an open one in the Fifth Circuit, and we expressly and emphatically decline to express an opinion thereupon.

61. The Missouri Supreme Court, we note, has taken the position that jury instructions in capital cases should, in addition to listing statutory mitigating factors, indicate simply that the jury may consider all of the evidence relating to the offense in connection with mitigation. While this instruction would, in the Missouri Supreme Court's view, allow jury consideration of mitigating factors that are not "authorized by law," the court has indicated that "no instruction should be given calling the jury's attention" to this fact. *See* 44 Mo.L.Rev. 359, 368-69 & n.64 (1979). The Mississippi Supreme Court apparently has not yet addressed this question, and neither do we.

violation of the Supreme Court's *Lockett* decision.[62] Accordingly, we reverse the district court's judgment insofar as it denied Washington habeas corpus relief that would secure him from the execution of the death sentence returned in his 1977 trial.

No party has as yet briefed or argued the question of the precise scope of habeas relief necessary, given that we have found constitutional error only in the sentencing phase of Washington's trial. In the first instance, Mississippi law would govern the various alternatives available to the state—*i. e.*, whether Washington could be resentenced to a sentence other than the death penalty on the basis of this conviction, or whether the State could seek a new death sentence from a jury convened solely for resentencing, or whether the State could seek a new death sentence only after retrying the issue of Washington's guilt as well.[63]

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62. Given our conclusions with respect to Washington's *Lockett* argument, we do not reach his other arguments as to why the district court's judgment with respect to Washington's sentence should be reversed: that the court erred in failing to hold an evidentiary hearing on Washington's claim that his death sentence was the product of racial discrimination; that the Mississippi courts' refusal further to define or delimit the "heinous, atrocious or cruel" aggravating circumstance of Miss.Code Ann. § 99-19-101(5)(h) (1980 Supp.) rendered that circumstance unconstitutionally vague and overbroad; and that the death penalty is unconstitutionally disproportionate in this case because there has been no finding that Washington deliberately took the life of another person.

63. *Cf.* Miss.Code Ann. § 99-19-107 (1980 Supp.) ("[i]n the event the death penalty is held to be unconstitutional by the Mississippi Supreme Court or the United States Supreme Court, the court having jurisdiction over a person previously sentenced to death . . . shall sentence such person to imprisonment for life, and such person shall not be eligible for work release or parole"); Miss.Code Ann. § 99-19-101(1) (1980 Supp.) ("[i]f, through impossibility or inability, the trial jury is unable to reconvene for a hearing on the issue of penalty, having determined the guilt of the accused, the trial judge may summon a jury to determine the issue of the imposition of the penalty"). We express no opinion as to whether either or both of these statutes may be relevant to this question.

There may, however, be federal constitutional overtones to any such decision based on Mississippi law. Accordingly, while we remand this case with instructions that the district court shall enter judgment granting appropriate habeas relief in accordance with this opinion, we leave it to the district court to determine, after briefing and argument by the parties, the precise form of such relief.[64]

AFFIRMED IN PART; REVERSED IN PART and REMANDED.

COLEMAN, Circuit Judge, dissenting.

If ever a coldblooded murder, committed in the course of a coldblooded robbery, deserved the death penalty this is it. The Supreme Court refused to interfere (441 U.S. 916, 99 S.Ct. 2016, 60 L.Ed.2d 388). Chief District Judge Keady denied habeas corpus relief. Now, this Court marches Washington out of the gas chamber on the entirely untenable argument that the trial judge violated the federal constitution in his Instruction No. C-20 and that a jury *might* have considered Washington's irresponsible attitude toward the rules of society, and his violation of the law and his self-indulgent procreation of an illegitimate child as a *mitigating factor* in prescribing the penalty for this inexcusable murder committed during the course of a callously planned robbery. With deference, I believe that the majority is bad wrong on both points.

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64. In the event that either Washington or the State challenges the precise form of relief granted by the district court, any appeal from the district court's newly-entered judgment shall be referred to this panel. *See United States v. Gaston*, 608 F.2d 607, 614 & n.3 (5th Cir. 1979).

I

The Instruction was not Unconstitutionally Erroneous

In the opening portion of the instruction the jury was told that it must "*consider the detailed circumstances of the offense for which the defendant was convicted and the defendant himself* (emphasis added)."

Chief Judge Kelly held that the state trial court had committed no error of a constitutional nature:

> "Specifically, the jury was not precluded from considering all mitigating factors shown by the evidence, whether or not they were directly brought to the attention by the court's instruction C-20. It is to be noted that the court excluded no evidence which was offered in mitigation, and that instruction C-20, while it expressly required the jury to 'consider only' one or more of the two pertinent statutory aggravating circumstances before voting the death penalty, did not restrict the jury to considering *only* petitioner's lack of significant history of prior criminal activity and his age as mitigating circumstances. Moreover, this instruction was not objected to at trial, and under it the jury was free to consider all mitigating evidence which petitioner saw fit to offer."

This instruction was not given until the jury had heard every extenuating word offered on behalf of the defendant. None of it was excluded. The majority concedes that, indeed, every bit of it was argued to the jury.

Competent counsel did not object to the instruction or any part of it. It is obvious that everybody understood what the instruction meant and that the issue of mitigation was presented accordingly.

The majority concedes that the law requires that instructions be considered as a whole but nevertheless attempts to separately and individually parse the various parts of this instruction in isolation, all in the attempt to hoist the murderer out of the gas chamber on an invisible non-existent web.

I cannot agree to thwarting a death penalty in such a manner.

II

There was no Mitigation in what the Majority Chooses to Assert "Might Have Been" Mitigating

Since April 5, 1956, it has been legally impossible for a person to contract a common law marriage in Mississippi. Such marriages are *absolutely void*.[1] For over a hundred years it has been a violation of Mississippi law for individuals to unlawfully cohabit, whether in adultery or fornication.[2] Neither society nor Mississippi law has ever favored the procreation of illegitimate children by self-indulgent fathers.

All this being so, I simply cannot understand how the majority holds that violating the law by living together in an illegal relationship and fathering an illegitimate daughter "might be" a mitigating factor in a coldly planned robbery wherein the defendant chose to shoot the victim's entrails out and then coolly reloaded his shotgun as if he had done no more than kill a rabbit.

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1. Chapter 239, Miss.Laws 1956; Section 93-1-15, Mississippi Code 1972.

2. Chapter 64, Art. 1, Hutchinson's Mississippi Code of 1848; Section 97-29-1, Mississippi Code 1972.

The only sensible conclusion is that the jury of citizens believed that Washington had shown no more regard for human life than he had for the views of society or the laws to which he had therefore paid no attention, including the law against the possession of marijuana.

This is a sad day for Mississippi's efforts to adequately punish a fiendish murder. Indeed, it is a sad day for Mississippi's efforts to enforce any of the criminal laws for which it has exclusive jurisdiction.

I respectfully dissent and I am constrained to express the hope that the State will seek en banc review of so much of this decision as voids the death penalty.

APPENDIX 2

John Lewis WASHINGTON,
Petitioner-Appellant,

v.

John C. WATKINS, Commissioner, Mississippi Department of Corrections, et al.,
Respondents-Appellees.

No. 80-3072.

United States Court of Appeals,
Fifth Circuit.*
Unit A

Dec. 3, 1981.

Appeal from the United States District Court for the Northern District of Mississippi; William C. Keady, Chief Judge.

Robert J. Brantley, Jr., Patrick Dale O'Rourke, Jackson, Miss., for petitioner-appellant.

Grady F. Tollison, Jr., Oxford, Miss., Anthony G. Amsterdam, Stanford Univ. Law School, Stanford, Cal., James S. Liebman, Joel Berger, John C. Boger, Judith Reed, Deborah Fins, New York City, Billy Gore, Sp. Asst. Atty. Gen., Jackson, Miss., for respondents-appellees.

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*Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

ON PETITION FOR REHEARING AND SUGGESTION FOR REHEARING
EN BANC

(Opinion September 14, 1981, 5 Cir. 1981, 655 F.2d 1346).

Before WISDOM, COLEMAN and RANDALL, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and the judges in regular active service of this Administrative Unit having been polled at the request of one of said judges and a majority of said judges not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16; Fifth Circuit Judicial Council Resolution of January 14, 1981), the Suggestion for Rehearing En Banc is also DENIED.

The Suggestion for Rehearing En Banc filed by the Respondents-Appellees described the jury instruction given in this case (discussed in Part III of the court's opinion, *Washington v. Watkins*, 655 F.2d 1346, 1367-77 (5th Cir. 1981)), as "patterned after Mississippi Model Jury Instruction 114.07" (Respondents-Appellees Suggestion for Rehearing En Banc at i) and represented that the instruction given "is presently in use throughout the State of Mississippi." *Id.* at ii, n. 1. In view of the fact that the court's opinion in this case suggested that, for several reasons specified in the opinion, 655 F.2d at 1377, the practical impact of its holding should be relatively narrow, the State's representation in the Suggestion for Rehearing En Banc caused us to obtain a copy of Mississippi Model Jury Instruction No. 114.07, as in effect during at least a part of 1977 (the year of Washington's trial). The relevant portion follows:

If an element of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstance(s). Consider the following element(s) of mitigation in determining whether the death penalty should not be imposed:

(1) That the defendant has no significant history of prior criminal activity.

(2) That the defendant was under the influence of extreme mental or emotional disturbance when the offense was committed.

(3) That the victim participated in the defendant's conduct or consented to the act.

(4) That the defendant was an accomplice to the capital murder committed by another person and the defendant's participation was relatively minor.

(5) That the defendant was under extreme duress or under the substantial domination of another person.

(6) That the capacity of the defendant to appreciate the criminality of this conduct or to conform his conduct to the requirements of law was substantially impaired.

(7) The defendant's age at the time of the capital murder.

(8) Any other facts which you find from the evidence reasonably mitigates against imposition of the death penalty.

If you find from the evidence that [one or more of] the preceding element(s) constitutes a mitigating

> circumstance(s), then you must consider whether [it/they] outweigh(s) the aggravating circumstances you previously found, and you must return one of the following verdicts. . . .

If the instruction given in this case was, in fact, patterned after the Model Jury Instruction, a comparison of the instruction given (reproduced at 655 F.2d 1367-68) and the Model Jury Instruction demonstrates that, whether by design or by inadvertence, the trial judge omitted paragraph (8) of the Model Jury Instruction, which authorizes the jury to consider "any other facts which you find from the evidence reasonably mitigates [sic] against imposition of the death penalty."

We assume that the State's seemingly equivocal representations to the district court (described at 655 F.2d 1377, n. 59) and its representations to this court in the Suggestion for Rehearing En Banc were inadvertent. In any event, they did place upon the district court and have placed on this court unnecessary and regretable burdens.

APPENDIX 3

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISON
NO. GC 79-33-K-P

JOHN LEWIS WASHINGTON,
Petitioner

v.

JOHN C. WATKINS, ET AL,
Respondents

MEMORANDUM OPINION

John Lewis Washington, petitioner in this federal habeas corpus action, attacks the constitutionality of his May 1977 conviction in the Circuit Court of Lowndes County, Mississippi, of the crime of capital murder and the sentence of death imposed upon him pursuant thereto. The petition was initially referred to Charles M. Powers, United States Magistrate, for report and recommendation on the several claims for habeas relief and the necessity, if any, for an evidentiary hearing. On September 24, 1979, the Magistrate reported that petitioner's several claims were without merit but nevertheless recommended that because of the death sentence the court grant an evidentiary hearing on the claim of ineffective assistance of counsel.

An evidentiary hearing limited to that single issue was held at Aberdeen, Mississippi, on November 9, 1979, and petitioner personally appeared on a writ of habeas corpus ad testificandum.

* * * * *

E. *Alleged Errors by Trial Court.*

We uphold the Magistrate's conclusion that in petitioner's trial there were no errors of a constitutional nature committed by the trial court. The trial was, as found by the state Supreme Court on appeal, in accordance with the state's new death penalty statute, and the verdicts of both guilt and punishment are supported by substantial evidence. Specifically, the jury was not precluded from considering all mitigating factors shown by the evidence, whether or not they were directly brought to [its] attention by the court's instruction C-20. It is to be noted that the court excluded no evidence which was offered in mitigation, and that instruction C-20, while it expressly required the jury to "consider only" one or more of the two pertinent statutory aggravating circumstances before voting the death penalty, did not restrict the jury to considering *only* petitioner's lack of significant history of prior criminal activity and his age as mitigating circumstances. Moreover, this instruction was not objected to at trial, and under it the jury was free to consider all mitigating evidence which petitioner saw fit to offer.

We expressly approve all other aspects of the Magistrate's Report recommending that the petition for writ of habeas corpus be denied, and we find from the record of the state trial and the evidence adduced before us that petitioner received a trial in the Circuit Court of Lowndes County, Mississippi, not tainted with constitutional error, and we therefore hold that his petition for writ of habeas corpus should be denied.

* * * * *

[Decided December 19, 1979]

APPENDIX 4

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISION
NO. GC 79-93-K-P

JOHN LEWIS WASHINGTON,
Plaintiff

V.

JOHN C. WATKINS, ET AL,
Defendants

REPORT AND RECOMMENDATION

In this petition for a writ of habeas corpus, John L. Washington, a black male, attacks the constitutionality of his May 1977 conviction in the Circuit Court of Lowndes County of the crime of felony murder and the sentence of death imposed upon him pursuant thereto. By order entered herein on June 1, 1979, this cause was referred to the United States Magistrate for report and recommendation on the necessity *vel non* of evidentiary hearing on petitioner's claims for habeas relief.

* * * * *

F. Due Process Challenge to Instruction C-20.

Petitioner contends that instruction C-20, to which no objection was raised at trial, impermissibly limited the jury's consideration of mitigating circumstances in violation of the Due Process Clause. The specific mitigating circumstances which petitioner contends was excluded from consideration by the jury is the fact, as to which he testified

at the presentence hearing, that he had a 3-year old child[16] by a woman with whom he had been "going with" for approximately five years and with whom he had been living for about two years. (R. 213-13).[17]

Under Mississippi law, objections to instructions are waived unless raised at trial. E.g., Evans v. State, 315 So.2d 1, 5 (Miss. 1975). Petitioner's failure to object to the instruction at trial accordingly would appear to preclude consideration of this claim by plaintiff for habeas relief, Bradley v. Wainwright, 561 F.2d 1200 (5 Cir. 1977), but assuming *arguendo* that it does not, the instruction did not deprive petitioner of a fundamentally fair trial.

> Before a federal court may grant relief under 28 U.S. C.A. § 2254 based on an alleged error in a state trial court's unobjected to charge, the error must be so egregious as to rise to the level of a Constitutional violation or so prejudicial as to render the trial itself fundamentally unfair. *See Alvarez v. Estelle,* 531 F.2d 1319, 1322 (5th Cir. 1976), and cases cited. *See also Bradley v. Wainwright,* 561 F.2d 1200 (5th Cir. 1977). And, just last term, the Supreme Court observed: "It is the rare case in which an improper instruction will justify reversal of a criminal conviction when no objection has been made in the trial court." *Henderson v. Kibbe,* 431 U.S. 145, 97 S.Ct. 1730, 1736, 52 L.Ed.2d 203 (1977) (note omitted).

Bryan v. Wainwright, 588 F.2d 1108, 1110-11 (5 Cir. 1979). As further noted in Henderson v. Kibbe, *supra,* "[a]n

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16. This fact was included in the argument of petitioner's counsel at the sentencing phase of trial. (R. 318).

17. In support of this contention, petitioner claims that "[t]he record reflected that the Petitioner had worked and supported a child and the child's mother." First Supplemental Memorandum in Support of Motion for Petition for Writ of Habeas Corpus at 3. The record, however, does not so reflect.

omission, or an incomplete instruction, is less likely to be prejudicial than a misstatement of the law." *Id.*, 431 U.S. at 155, 52 L.Ed.2d at 213.

While instruction C-20 could be more complete, it is not a misstatement of the law. The instruction directed the jury to "consider the detailed circumstances . . . of the defendant himself", admonished the jury to "[c]onsider *only*" the two relevant statutory aggravating circumstances, and further instructed that if such aggravating circumstances were found, to "consider whether there are mitigating circumstances which outweigh the aggravating circumstances," and specifically to "consider" the two relevant *statutory* mitigating circumstances. The trial court thus properly instructed the jury in accordance with § 99-19-101, albeit not in the clearest terms, by directing the jury that certain statutory aggravating circumstances must be found to permit imposition of the death penalty, but that if such were found, the death penalty nevertheless could not be imposed if pertinent *statutory* mitigating circumstances were found to outweigh the statutory aggravating circumstances. There is no express language in the instruction which directs the jury to limit its consideration of mitigating circumstances to the two relevant statutory mitigating circumstances. Furthermore, whether exclusion of consideration of particular mitigating circumstances constitutes a due process violation depends upon the facts of the case and the degree of relevancy of the excluded mitigating factors. *See* Green v. Georgia, ..., U.S. ....., 60 L.Ed.2d 738, 741 (1979). Under the facts of the instant case, any prejudice resulting to petitioner from the lack of clarity of instruction C-20 was not such as to deprive petitioner of a fundamentally fair trial.

* * * * *

[Reported September 24, 1979]

APPENDIX 5

Johnny Lewis WASHINGTON

v.

STATE of Mississippi.

No. 50401.
Supreme Court of Mississippi.
July 12, 1978.

Defendant was convicted in the Circuit Court, Lowndes County, Harvey Buck, J., of capital murder and was sentenced to death. Defendant appealed. The Supreme Court, Robertson, P. J., held that: (1) the statutory provision listing as an aggravating circumstance that might be considered by the jury in a capital case that "The capital offense was especially heinous, atrocious or cruel," was not unconstitutionally vague; (2) the death penalty is not unconstitutional per se, and (3) aggravating circumstances outweighed mitigating circumstances and justified the imposition of the death penalty.

Affirmed and date of execution set.

1. Criminal Law (Key) 13.1(2)

Statutory provision listing as aggravating circumstance which may be considered by jury in capital case as "The capital offense was especially heinous, atrocious or cruel," was not unconstitutionally vague. Code 1972, § 99-19-101(5)(h).

2. Criminal Law (Key) 1213

Death penalty was not unconstitutional per se. Code 1972, § 99-19-101.

3. Homicide (Key) 354

Where murder was committed in course of armed robbery and defendant's shooting victim with shotgun was especially atrocious in light of fact that he could easily have escaped scene of robbery without shooting, imposition of death penalty was justified, notwithstanding mitigating circumstances that defendant was 23 years old and had no prior significant history of criminal activity. Code 1972, § 99-19-101(5).

C. Darrell Reeves, Colombus, for appellant.

A. F. Summer, Atty. Gen. by Billy L. Gore, Special Asst. Atty. Gen., Jackson, for appellee.

EN BANC.

ROBERTSON, Presiding Justice, for the Court:

Johnny Lewis Washington was indicted, and tried on May 24, 25 and 26, 1977, in the Circuit Court of Lowndes County, Mississippi, for the capital murder of J. K. Woods.

A bifurcated trial was conducted in accordance with the provisions of Mississippi Code Annotated sections 99-19-101 and 99-19-103 (Supp.1977), which laws were enacted by the Mississippi Legislature after carefully studying and analyzing *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976), and went into effect on April 13, 1977.

At the conclusion of the guilt phase of the trial, the jury returned a unanimous verdict of "guilty of capital

murder." Thereupon a separate sentencing proceeding was conducted strictly in accordance with the provisions of Sections 99-19-101 and 99-19-103, before the same trial jury.

The trial jury returned this verdict:

> "We the jury unanimously find that the aggravating circumstances of one, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery; two, the defendant Johnny Lewis Washington committed the capital murder in an especially heinous, atrocious, or cruel manner are sufficient to impose the death penalty. That there are unsufficient mitigating circumstances to outweigh the aggravating circumstances. And we unanimously find that the defendant should suffer death."

In accordance with the unanimous jury verdict, the court sentenced the defendant to suffer death by lethal gas on July 8, 1977. After appeal was perfected, execution was suspended.

The indictment recited in part:

> "That JOHNNY LEWIS WASHINGTON late of the County aforesaid, on OR ABOUT the 26TH day of MARCH in the year of our Lord, 1977, did then and there wilfully, unlawfully, feloniously and of HIS malice aforethought kill and murder a human being, J. K. WOODS, WITHOUT AUTHORITY AT LAW AND NOT IN NECESSARY SELF-DEFENSE WHILE HE, THE SAID JOHNNY LEWIS WASHINGTON WAS THEN AND THERE ENGAGED IN THE COMMISSION OF THE CRIME OF ARMED ROBBERY IN VIOLATION OF SECTION 97-3-19(2)(E) OF THE MISSISSIPPI CODE ANNOTATED, 1972, . ."

Mississippi Code Annotated section 97-3-19 (Supp. 1977), provides in pertinent part:

> "(2) The killing of a human being without the authority of law by any means or in any manner shall be capital murder in the following cases:
>
> . . . . .
>
> "(e) When done with or without any design to effect death, by any person engaged in the commission of the crime of rape, burglary, kidnapping, arson or robbery, or in any attempt to commit such felonies;"

Woods Quick Pick, a Columbus, Mississippi, convenience store, was robbed on the night of March 26, 1977, by two men armed with shotguns and wearing stocking masks. During the robbery, one of the bandits, later identified as Johnny Lewis Washington, at close range shot J. K. Woods, the proprietor of the store, in the stomach with a long-barrel shotgun loaded with buckshot. Woods died about five hours later in a Columbus hospital.

Booker T. Cole, Jr. testified that between 7:30 and 8:00 P.M. on March 26, 1977, Johnny Washington contacted him and told him to come by his house because "he had something up". Some time later, when Cole arrived at Washington's house, the defendant told Cole that they were going to rob a Quick Pick. Washington provided Cole with a stocking mask and a sawed-off shotgun, and they took up their station across the street from Woods Quick Pick. After assembling and loading their shotguns, when the coast was clear they ran across the street and into Woods Quick Pick store. J. K. Woods, owner of the store, Roy Thompson, an employee, and a female employee, Elouise Clark, were in the store.

Cole and Washington pointed their shotguns at Woods and Thompson, and told them to open the cash registers and

"give us the money". Thompson began to put the money from the first cash register into a brown paper sack. Cole, the smaller and younger of the two robbers, found a bank sack of money in a cabinet drawer, and he fled with that sack.

Washington, in the meantime, ordered Woods to put the money from the second cash register into the same paper sack that Thompson had put the money from the first cash register. Woods misunderstood and reached for another paper sack, whereupon, according to the testimony of Thompson, Washington hit Woods over the head with the gun barrel "just as hard as he could". In falling, Woods knocked Thompson's sack of money off on the floor. Thompson told Washington that Woods had been drinking and to let him sack the money. Washington told Thompson not to move and placed the shotgun about 8 inches from Thompson's head. Woods went ahead and picked up the sack and sacked the money from the second cash register.

As Woods handed Washington the sack in one hand, he reached for the gun barrel with the other, but missed, and Washington kept the gun on Woods as he, Washington, backed toward the door. Woods moved very slowly toward Washington. Just before he left, Washington fired his shotgun into Woods' stomach. Washington reloaded his shotgun and left. Thompson testified that Washington and Woods were about 10 feet apart when Washington fired, and that Washington could very easily have made his exit with his sack of money without shooting Woods.

Cole testified that he was a short distance away when he heard the shot, and Washington came running out of the store telling Cole that he had shot Woods. Cole testified that later that night, about 12:30 or 1:00 A.M., they got together and divided the money (about $600) between them.

Washington's defense was that he was at a party, was not at Woods Quick Pick, did not commit the robbery, nor did he kill Woods. Several people at the party testified that Washington did not arrive there until around midnight, and no witness testified that Washington was there from 10:00 to 10:30 P.M.

Ben Hodo of Ethelsville, Alabama, was visiting his grandmother in Columbus, Mississippi, on the night of the robbery. He testified that around 10:00 P.M., as he was going down to Lee's Restaurant to get something to eat, he saw a man in an alley next to Woods Quick Pick with a long gun and a sack of money. Hodo testified that he and the man with the long gun looked at each other about 10 seconds and that they were close together. He positively identified Washington as the one he saw in the alley with the sack of money and long gun.

After a full trial (the Record on the guilt phase consisting of 308 pages in two volumes), the jury returned a verdict of guilty of capital murder.

Before the same jury, the court then took evidence in aggravation and mitigation. Eyewitness Thompson testified in aggravation that Washington hit Woods with the gun barrel as hard as he could; that "He should have knocked him out looked like." Thompson further testified:

> "Q Do you know of any other reason why Mr. Woods was killed?
>
> A No, sir, I don't. He had the money and he had backed all the way to the door. And I thought sure he was just going to back on out. But he backed to the door and then pulled the trigger.
>
> Q What did he do after he had shot?

A He stood there and reloaded his gun. And that is when I thought he was going to turn and shoot me."

On cross-examination, Thompson answered that Woods had been drinking and when asked about whether Mr. Woods was advancing on Washington, Thompson said:

"And Mr. Woods, he was traveling slower than the boy with the gun. He could have backed. He backed to the door and could have backed right on out. Mr. Woods couldn't have got nowhere close to him."

In mitigation, Washington testified that he was 23 years old, that, while he had been living with a lady for about five years, he was not married but had a three-year-old daughter by her. When asked by his counsel whether he had ever been convicted of a crime, Washington replied that he had been convicted of a "marijuana crime that same year" for which he had paid a $400 fine.

In strict compliance with the provisions of Section 99-19-101, supra, before the jury retired to consider the sentence, the court gave this instruction:

INSTRUCTION C-20

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

To return the death penalty, you must find that aggravating circumstances—those which tend to warrant the death penalty—outweigh the mitigating cir-

cumstances—those which tend to warrant the less severe penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed:

(1) The capital murder was committed while the defendant, Johnny Lewis Washington, was engaged in the commission of the crime of robbery.

(2) The defendant, Johnny Lewis Washington, committed the capital murder in an especially heinous, atrocious or cruel manner.

You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of those elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

> "We, the jury, find that the defendant should be sentenced to life imprisonment."

If one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. Consider the following elements of mitigation in determining whether the death penalty should not be imposed:

(1) That the defendant has no significant history of prior criminal activity.

(2) The defendant's age at the time of the capital murder.

If you unanimously find from the evidence that one or more of the preceding elements of mitigation

exists, then you must consider whether it outweighs the aggravating circumstances you previously found, and you must return one of the following verdicts. The verdict you return must be written on a separate sheet of paper.

(1) "We the jury, unanimously find that the aggravating circumstance(s) of:

.....

.....

.....

is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance(s), and we unanimously find that the defendant should suffer death.

.....

Foreman of the Jury"

(2) "We, the jury, find that the defendant should be sentenced to life imprisonment."

(3) "The jury has been unable to agree unanimously on punishment."

The jury returned this verdict:

"We the jury unanimously find that the aggravating circumstances of one, the capital murder was committed while the defendant Johnny Lewis Washington was engaged in the commission of the crime of robbery; two, the defendant Johnny Lewis Washington committed the capital murder in an especially heinous, atrocious, or cruel manner are sufficient to impose the death penalty. That there are insufficient mitigating circumstances to outweigh the aggravating cir-

cumstances. And we unanimously find that the defendant should suffer death. S. E. Nolen, Foreman of the Jury."

Appellant assigns these two errors:

(1) Section 99-19-101(5)(h) of the Mississippi Code of 1972 is unconstitutionally vague.

(2) The imposition of the death penalty is unconstitutional per se.

[1] Mississippi Code Annotated section 99-19-101(5) (Supp.1977) lists eight aggravating circumstances which may be considered by the jury. (5)(h) provides:

"The capital offense was especially heinous, atrocious or cruel."

The appellant contends that the language of (5)(h) is unconstitutionally vague. We do not agree.

We must remember that the twelve members of the trial jury were a jury of the defendant's peers, and came from the county of the defendant's residence. The jury was composed of average citizens possessing average intelligence, a cross-section, if you please, of the citizenry of the community. In our opinion the words "especially heinous, atrocious or cruel" are not confusing nor likely to be misunderstood by the average citizen. The average citizen has a reasonable knowledge of the generally accepted meaning of these words. He comes in contact with these words frequently, if not in personal conversation at least through the news media of television, radio or the press.

We think this language from *Gregg v. Georgia, supra,* sheds light on the confidence we must place in the average contemporary jury to correctly interpret words which of necessity must be general when placed in statutes:

> "Jury sentencing has been considered desirable in capital cases in order 'to maintain a link between contemporary community values and the penal system—a link without which the determination of punishment could hardly reflect 'the evolving standards of decency that mark the progress of a maturing society.'' *Witherspoon v. Illinois*, 391 U.S. [510], at 519 n. 15, 88 S.Ct. [1770], at 1775 n. 15 [20 L.Ed.2d 776 (1968)], quoting *Trop v. Dulles*, 356 U.S. [86], at 101, 78 S.Ct. [590], at 598 [2 L.Ed.2d 630 (1958)] (plurality opinion)." 428 U.S. at 190, 96 S.Ct. at 2933, 49 L.Ed.2d at 884.

The facts in no two cases are exactly identical and no precise definition or formula can be made to cover every possible factual situation.

It is our considered opinion that the average jury in its sound discretion and judgment understands the generally accepted meaning of the words "especially heinous, atrocious or cruel" and is able to apply these words to different factual situations without further definition of these words.

It is our opinion that these words are not unconstitutionally vague.

[2] The second assignment of error, that the imposition of the death penalty is unconstitutional per se, was fully answered adversely to the contentions of the appellant by the Supreme Court of the United States in *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972); *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d [illegible] (1976); *Proffitt v. Florida*, 428 U.S. 242, 96 S.Ct. 2960, 49 L.Ed.2d 913 (1976); *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976); *Woodson v. North Carolina*, 428 U.S. 280, 96 S.Ct. 2978, 49 L.Ed.2d 944 (1976); *Roberts v. Louisiana*, 428 U.S. 325, 96 S.Ct. 3001, 49 L.Ed.2d 974 (1976).

There is no merit in this second assignment of error.

Mississippi Code Annotated section 99-19-105 (Supp. 1977), requires of this Court a very careful, painstaking and meaningful appellate review of each case wherein the death penalty is imposed:

> "(1) Whenever the death penalty is imposed, and upon the judgment becoming final in the trial court, the sentence shall be reviewed on the record by the Mississippi Supreme Court. . . .
>
> (2) The Mississippi Supreme Court shall consider the punishment as well as any errors enumerated by way of appeal.
>
> (3) With regard to the sentence, the court shall determine:
>
> (a) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor;
>
> (b) Whether the evidence supports the jury's or judge's finding of a statutory aggravating circumstance as enumerated in section 99-19-101; and
>
> (c) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.
>
> (4) Both the defendant and the state shall have the right to submit briefs within the time provided by the court, and to present oral argument to the court.
>
> (5) The court shall include in its decision a reference to those similar cases which it took into consideration. . ."

Both the defendant and the state submitted well-prepared, thorough and excellent briefs and this Court, sitting

en banc, heard able oral arguments from defense counsel and the State. In addition, this Court has carefully studied the 365-page two-volume record, as well as the four legal page single-spaced report of the trial judge on the standard questionnaire form prepared and supplied by this Court.

This Court has also carefully and maturely considered the punishment (the death penalty), in addition to the two assignments of error so ably argued and briefed by defense counsel.

[3] This Court is of the unanimous opinion, and now determines that:

(a) The sentence of death was not imposed under the influence of passion, prejudice or any other arbitrary factor;

(b) The evidence fully supports the jury's unanimous finding of not one, but two aggravating circumstances enumerated in section 99-19-101(5);

(c) The sentence of death is not excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the defendant.

Although Mississippi Code Annotated section 99-19-103 (Supp.1977) mandatorily requires that only one of the eight statutory aggravating circumstances enumerated in section 99-19-101 be found by the sentencing jury, the jury in the case at bar unanimously found that these two aggravating circumstances existed:

> "(d) The capital offense was committed while the defendant was engaged . . in the commission of . . . robbery, . . ." and
>
> "(h) The capital offense was especially heinous, atrocious or cruel."

In considering whether the sentence of death was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," we first compared the case at bar with the only capital murder case reaching us after *Gregg v. Georgia, supra.* That case was *Bell v. State of Mississippi,* 360 So.2d 1206, affirmed by us on May 24, 1978. *Bell* also was an armed robbery case where the robbery had been successfully completed and the killing afterward was wanton and useless and utterly unnecessary.

In *Bell,* we said:

> "The remaining twenty cases in which the death sentence was affirmed were for the crime of murder. Of that twenty, three involved the murder of an inmate by another inmate at the state penitentiary, two involved the murder of police officers, eight are murders with various aggravating circumstances and most significantly, seven of the cases involved murder in which the aggravating circumstance of robbery or burglary was present. *Anderson v. State,* 246 Miss. 821, 152 So.2d 702 (1963); *Simmons v. State,* 241 Miss. 481, 130 So.2d 860 (1961); *Thompson v. State,* 231 Miss. 624, 97 So.2d 227 (1957); *Jones v. State,* 228 Miss. 458, 88 So.2d 91 (1956); *Keeler v. State,* 226 Miss. 199, 84 So.2d 153 (1955); *Gilmore v. State,* 225 Miss. 173, 82 So.2d 838 (1955); *Lewis v. State,* 222 Miss. 140, 75 So.2d 448 (1954).
>
> . . . . .
>
> "We also note that while no death sentences have been affirmed in this Court since 1964, other jurisdictions have recently considered similar cases and have approved the penalty imposed. *Richmond v. State,* 114 Ariz. 186, 560 P.2d 41 (1976), *cert. den'd,* 433 U.S. 915, 97 S.Ct. 2988, 53 L.Ed.2d 1101 (1977) [murder armed

robbery]; *Cooper v. State,* 336 So.2d 1133 (Fla.1976), *cert. den'd,* 431 U.S. 925, 97 S.Ct. 2200, 53 L.Ed.2d 239 (1977) [murder armed robbery]; *Harris v. State,* 237 Ga. 718, 230 S.E.2d 1 (1976) [Execution style murder], *cert. den'd,* 431 U.S. 933, 97 S.Ct. 2642, 53 L.Ed.2d 251 (1977); *Floyd v. State,* 233 Ga. 280, 210 S.E.2d 810 (1974), *cert. den'd,* 431 U.S. 949, 97 S.Ct. 2667, 53 L. Ed.2d 266 (1977) [murder armed robbery]; *Gholson v. State,* 542 S.W.2d 395 (Tex.Cr.App.1976), *cert. den'd,* 432 U.S. 911, 97 S.Ct. 2960, 53 L.Ed.2d 1084 (1977) [murder armed robbery]."

The jury had before it this evidence: The killing was committed during the commission of an armed robbery. Prior to killing Woods, the defendant struck the victim over the head with a long barrel shotgun with much force. The defendant, with a bag full of money, had reached the door and could have easily left without any danger to himself, yet he fired a load of buckshot at close range into the stomach of Woods, causing a massive wound from which there was no chance of recovery. It was an especially wanton, willful, useless and cruel killing.

In *Lockett v. State of Ohio,* ..... U.S. ....., 98 S.Ct. 2954, 2967, 57 L.Ed.2d 973 (1978), the Supreme Court of the United States held that, because the Ohio statute limited the mitigating circumstances that could be considered to the three mitigating circumstances listed in the statute, this particular statute was unconstitutional. The Court said:

"[This] limited range of mitigating circumstances which may be considered by the sentencer under the Ohio statute is incompatible with the Eighth and Fourteenth Amendments. To meet constitutional requirements, a death penalty statute must not preclude con-

> sideration of *relevant mitigating factors.*" (Emphasis added).

Lockett bears no resemblance to *Washington.*

Section 99-19-101 supra, after providing for a separate sentencing proceeding, provides:

> "In the proceeding, evidence may be presented as to *any matter that the court deems relevant to sentence,* and shall include matters relating to *any of the* aggravating or *mitigating circumstances.*" (Emphasis added).

This section then goes on to enumerate seven different kinds of mitigating circumstances that could be considered by the sentencing jury.

In *Jackson v. State of Mississippi,* 337 So.2d 1242 (Miss. 1976), this Court said:

> "At this hearing, the defendant may prove *his lack of a prior criminal record* as a mitigating circumstance and may also adduce proof of *any other circumstance or combination of circumstances surrounding his life and character or the commission of the offense with which he is charged that would be reasonably relevant* to the question of whether *he* should suffer death or be sentenced to life in prison." (Emphasis added).

It is crystal clear from our holding in *Jackson* that this Court is committed to the "individualized consideration of mitigating factors" in each case, and that the only limitation placed on the introduction of evidence of mitigating circumstances is that it must be *reasonably relevant.*

At the separate sentencing proceeding the defendant only presented evidence of these two mitigating circumstances: That he was 23 years old and had no prior significant history of criminal activity.

The jury carefully weighed these mitigating circumstances and found that these were insufficient mitigating circumstances to outweigh the two aggravating circumstances, and returned a unanimous verdict that the defendant should suffer death.

In our unanimous opinion the verdict of the jury was fully and amply supported by the evidence adduced.

The conviction of capital murder and the sentence to death are, therefore, affirmed, and Thursday, the 24th of August, 1978, is set as the date for the execution of the sentence and the infliction of the death penalty in the manner provided by law.

AFFIRMED AND THURSDAY, AUGUST 24, 1978, SET FOR DATE OF EXECUTION OF DEATH SENTENCE.

PATTERSON, C. J., SMITH, P. J., and SUGG, WALKER, BROOM, LEE, BOWLING and COFER, JJ., concur.

APPENDIX 6

IN THE
CIRCUIT COURT OF LOWNDES COUNTY,
MISSISSIPPI
MAY TERM, 1977
NO. 5859
STATE OF MISSISSIPPI
VERSUS
JOHNNY LEWIS WASHINGTON, DEFENDANT

INSTRUCTION C-20

You have found the defendant guilty of the crime of capital murder. You must now decide whether the defendant will be sentenced to death or to life imprisonment. In reaching your decision, you must objectively consider the detailed circumstances of the offense for which the defendant was convicted, and the defendant himself.

To return the death penalty, you must find that aggravating circumstances - those which tend to warrant the death penalty - outweigh the mitigating circumstances - those which tend to warrant the less severe penalty.

Consider only the following elements of aggravation in determining whether the death penalty should be imposed:

(1) The capital murder was committed while the defendant, Johnny Lewis Washington, was engaged in the commission of the crime of robbery.

(2) The defendant, Johnny Lewis Washington, committed the capital murder in an especially heinous, atrocious or cruel manner.

You must unanimously find, beyond a reasonable doubt, that one or more of the preceding aggravating circumstances exists in this case to return the death penalty. If none of those elements are found to exist, the death penalty may not be imposed, and you shall write the following verdict on a sheet of paper:

"We, the jury, find that the defendant should be sentenced to life imprisonment."

If one or more of those elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. Consider the following elements of mitigation in determining whether the death penalty should not be imposed:

(1) That the defendant has no significant history of prior criminal activity.

(2) The defendant's age at the time of the capital murder.

If you unanimously find from the evidence that one or more of the preceding elements of mitigation exists, then you must consider whether it outweighs the aggravating circumstances you previously found, and you must return one of the following verdicts. The verdict you return must be written on a separate sheet of paper.

(1) "We, the jury, unanimously find that the aggravating circumstance(s) of:

.....

.....

.....

is sufficient to impose the death penalty and that there are insufficient mitigating circumstances to outweigh the aggravating circumstance(s), and we unanimously find that the defendant should suffer death.

.....

Foreman of the Jury"

(2) "We, the jury, find that the defendant should be sentenced to life imprisonment."

(3) "The jury has been unable to agree unanimously on punishment."

APPENDIX 7

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT
OF MISSISSIPPI
GREENVILLE DIVISION
NO. GC 79-93-K-P

JOHN LEWIS WASHINGTON
PETITIONER

VERSUS

JOHN C. WATKINS, ET AL
RESPONDENT

MEMORANDUM IN SUPPORT OF ANSWER AND RETURN TO PETITION FOR WRIT OF HABEAS CORPUS

RESPONSE TO MOTION FOR DISCOVERY AND EVIDENTIARY HEARING.

Petitioner's Petition for Writ of Habeas Corpus was filed on May 24, 1979, together with a Memorandum of law treating the constitutional questions presented. On June 1, 1979, respondent filed an Answer consisting largely of general denials and admissions, where applicable, and submitting in conclusion that no federal habeas relief was due. On June 7, 1979, petitioner filed his Traverse. Incorporated therein was a Motion To Stay Proceedings and Motion for Discovery and Evidentiary Hearing. On 14 June 1979, petitioner filed his First Supplemental Memorandum in Support of Motion for Petition for Writ of Habeas Corpus. There he addressed an issue brought to light during oral argument on his motion to stay execution of the judgment below.

* * * * *

[G]

DID SECTION 99-19-101 ET SEQ. AND THE TRIAL COURT'S INSTRUCTION C-20 LIMIT, IN VIOLATION OF FOURTEENTH AMENDMENT DUE PROCESS, THE SENTENCING JURY'S CONSIDERATION OF MITIGATING CIRCUMSTANCES?

This response is directed to the challenge reflected in section V (5) of the habeas petition. The question was not directly addressed in petitioner's first memorandum of authorities filed on May 24, 1979, but argument was advanced subsequently in petitioner's First Supplemental Memorandum *et cetera* filed on June 14th, 1979. The scope of the constitutional contention made originally in V (5) of the habeas petition has been broadened, we note, to include a claim that Instruction C-20 limited unduly the sentencing authority's consideration of mitigating circumstances.

During oral argument conducted pursuant to petitioner's motion to stay execution of the sentence imposed below, this Court introduced, *sua sponte*, the latter issue. Petitioner has more fully explored the matter in his supplemental memorandum. His constitutional claim is thus presented in a dual context.

First, petitioner claims that the statute, on its face, limits in any case the sentencing authority's consideration of mitigating factors; second, he claims that the court's instruction C-20 given without objection in his case suffered from the same unconstitutional infirmity. Respondent addresses these questions in the sequential order we have listed them.

* * * * *

(2) INSTRUCTION C-20

Moving to an assessment of petitioner's second contention, we note, first of all, that the argument advanced was not vigorously asserted, if asserted at all, until this Court raised the issue, *sua sponte*, during the hearing conducted pursuant to the motion to stay execution of the trial court's judgment. The fact that this question was not sharply defined until the filing of petitioner's First Supplemental Memorandum *et cetera* filed belatedly on June 14th, 1979, tends to detract, we think, from the substantiality of his contention. Regardless, his position that Instruction C-20 limited the jury's consideration of mitigating circumstances when other possible mitigating factors existed is devoid of merit.

* * * * *

We note further that defense counsel was given an express opportunity to object to any particular facet of Instruction C-20. (Vol. II:R. 315) He did not elect to do so. Under Mississippi law a specific objection to an instruction of the court below must be made at trial or else the objection is waived. SEE: *Evans v. State*, 315 So.2d 1 (Miss. 1975); *Rayburn v. State*, 312 So.2d 454 (Miss. 1975).

This procedural requirement, we respectfully submit, constitutes an independent and adequate state procedural ground for rejecting petitioner's present argument. *Wainwright v. Skyes*, ... U.S. ....., 97 S.Ct. ....., 53 L.Ed.2d 594 (1977). Moreover, it is well settled that habeas corpus does not lie to set aside a conviction on the basis of improper instructions to the jury unless the impropriety is a clear denial of due process so as to render the trial fundamentally unfair. *Bradley v. Wainwright*, 561 F.2d 1200 (5th Cir. 1977), and the cases cited therein. There is no clear denial in this case, if there is any denial at all.

* * * * *

[Filed July 24, 1979]

APPENDIX 8

JOHNNY LEWIS WASHINGTON,

the defendant, having been duly sworn by the clerk, testified as follows:

DIRECT EXAMINATION ON BEHALF OF THE DEFENDANT

BY MR. REEVES:

Q. Would you state your name for the record?

A. Johnny Lewis Washington.

Q. Johnny, how old are you?

A. Twenty three.

Q. Are you married?

A. Well, I am not married, but I live with a lady.

Q. And who is this?

A. Betty Ann Alexander.

Q. How long have you lived with her?

A. I would say about five years.

Q. Go ahead.

A. Well, see, I ain't been living with her five years. But I was going with her about five years.

Q. How long have you been living with her?

A. About two years.

Q. Do you and she have any children?

A. One

Q. And what is that?

A. A girl.

Q. And how old is she?

A. About three years old.

Q. And she lives with you now?

A. Yes.

Q. Have you ever been convicted of a crime?

A. Well, I got convicted of a marijuana crime.

Q. And when was that?

A. April, I can't quite remember. I think April 7, April something.

Q. April of last year?

A. This year.

Q. Of this Year?

A. Yes.

Q. And were you sentenced to jail for that crime?

A. Well, I didn't go to jail. But I kind of bonded out at the time.

Q. And what was your ultimate sentence?

A. A fine of $400.

Q. $400 for possession of marijuana?

A. Yes.

Q. Have you ever been convicted of any other crime?

A. No, I haven't.

CROSS EXAMINATION ON BEHALF OF THE STATE OF MISSISSIPPI

BY MR. HOWARD:

Q. Johnny Lewis, where do you work or where did you work before this happened?

A. Weyerhaeuser.

Q. How long have you been working for them?

A. Well, I worked ever since November. I was working for Steeple Jack Roofing Company before I worked for Weyerhaeuser.

Q. How long did you work for them?

A. I worked for them all last year.

Q. All of last year?

A. Yes.

Q. And then before that?

A. I was working at, I think, Beneke. Yes, Beneke.

Q. And before that?

A. I worked at the Post Office.

Q. And before that?

A. I worked at the city.

Q. The city?

A. Um-hum (indicating yes).

Q. The City of Columbus?

A. Yes.

Q. Do you remember before that?

A. Johnston.

Q. Johnston Tombigbee Furniture?

A. Yes.

Q. And before that?

A. I was working with my father.

Q. You worked with your father before that. Did you work any before that, before you started working with your father, have any other regular employment?

A. Well, you know, I just worked with my father's boss man, that is all.

I don't believe I have anything further, your Honor.

THE COURT:

Do you have any other evidence you would like to present in mitigation?

MR. REEVES:

That is all we have, your Honor.

Opposition

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SUPREME COURT, U.S.

NO. 81-1659

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1981

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JOHN C. WATKINS, Commissioner, et al.,

Petitioner,

-against-

JOHN LEWIS WASHINGTON,

Respondent.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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ATTORNEYS FOR RESPONDENT

QUESTIONS PRESENTED

1. Whether a constitutional claim previously decided on the merits by the Mississippi Supreme Court may be heard in federal habeas corpus proceedings?
2. Whether the Court of Appeals properly interpreted a particular jury instruction given at respondent's sentencing trial, for the purpose of applying to it the established principle that a State may not preclude a capital-sentencing jury from considering any of the mitigating circumstances in the case?

TABLE OF CONTENTS

	Page
Questions Presented	i
Table of Authorities	iii
Statement of the Case	1
Reasons for Denying the Writ	2
Conclusion	5

TABLE OF AUTHORITIES

	Page
Cases	
Boykin v. Alabama, 395 U.S. 238 (1969)	2,3
Castaneda v. Partida, 430 U.S. 482 (1977)	2
Eddings v. Oklahoma, ___U.S. ___, 71 L.Ed.2d 1 (1982)	3,4
Franks v. Delaware, 438 U.S. 154 (1979)	2
Gray v. State, 375 So. 2d 994 (Miss. 1979)	3
Lefkowitz v. Newsome, 420 U.S. 283 (1975)	2
Mullaney v. Wilbur, 421 U.S. 680 (1975)	2
Payton v. New York, 445 U.S. 573 (1980)	2
Ulster County Court v. Allen, 442 U.S. 140 (1979) ...	2
Wainwright v. Sykes, 433 U.S. 72 (1977)	2
Warden v. Hayden, 387 U.S. 294 (1967)	2,3
Washington v. State, 361 So. 2d 60 (Miss. 1978)	2
Statutes	
Miss. Code Ann. § 99-19-101	2

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RESPONDENT'S BRIEF IN OPPOSITION

The respondent John Lewis Washington respectfully opposes the petition for a writ of certiorari filed on March 2, 1982 by petitioners John C. Watkins, et al., seeking review of the Fifth Circuit's decision in this case. This brief in opposition is being filed within 30 days after receipt of the petition, as provided by Rule 22.1 of the Rules of the Court.

STATEMENT OF THE CASE

The facts of the case are set forth in detail in the opinion of the Court of Appeals appended to the petition for a writ of certiorari. A-9 to A-15, A-48 to A-52, A-65 to A-71, A-78 to A-80.

REASONS FOR DENYING THE WRIT

The explanation for the lengthy and elaborate argumentation in this certiorari petition is easy to discern. Petitioners attempt to talk their way around three basic points that make the case unworthy of this Court's plenary consideration:

First, the Lockett[1/] issue to which petitioner attempts to apply the bar of Wainwright v. Sykes, 433 U.S. 72 (1977), was decided by the Mississippi Supreme Court on the merits in respondent's direct appeal from his conviction and death sentence.[2/] Under established rules, a constitutional claim adjudicated on its merits by the highest state court is cognizable in federal habeas corpus proceedings. See, e.g., Payton v. New York, 445 U.S. 573, 582 n.19 (1980); Ulster County Court v. Allen, 442 U.S. 140, 152-54 (1979); Franks v. Delaware, 438 U.S. 154, 162 (1979); Castaneda v. Partida, 430 U.S. 482, 485-86 n.4 (1977); Mullaney v. Wilbur, 421 U.S. 680, 704-05 n.* (1975) (Rehnquist, J., concurring); Lefkowitz v. Newsome, 420 U.S. 283, 291-92 n.9 (1975); Boykin v. Alabama, 395 U.S. 238, 240-42 (1969); Warden v. Hayden, 387 U.S. 294,

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1/ See Lockett v. Ohio, 438 U.S. 586 (1978).

2/ A-92 to A-95, A-100 to A-102, Washington v. State, 361 So. 2d 60, 64, 67-68 (Miss. 1978). The Mississippi Supreme Court concluded both that "Lockett bears no resemblance to Washington," because Miss. Code Ann. § 99-19-101 requires consideration of all "reasonably relevant" mitigating circumstances, and that the mitigating-circumstance instruction actually given at petitioner's trial (quoted in full in the Supreme Court's opinion) was "[i]n strict compliance with Section 99-19-101, supra." A-91 to A-95, A-101. Given this ruling, the State of Mississippi expressly informed the District Court in the State's Answer and Return to Petition for Writ of Habeas Corpus, at p. 1, that the Mississippi Supreme Court's decision in Washington v. State fully "exhausted [Washington's] ... state remedies" on his claim that the jury instructions at his sentencing trial violated the rule of Lockett.

297 n.3 (1967). The fact that the Mississippi Supreme Court reached the issue sua sponte (unsurprising, inasmuch as Lockett was decided only nine days before the Mississippi Supreme Court issued its opinion in respondent's case) is utterly immaterial for any conceivable purpose. See Boykin v. Alabama, supra, 395 U.S. at 240-42.

Second, in the wake of Eddings v. Oklahoma, ___ U.S. ___, 71 L.Ed.2d 1 (1982), the Fifth Circuit's resolution of respondent's Lockett claim raises no issue of the slightest consequence. All that is involved is the application of the now-settled Lockett-Eddings principle to a particular jury instruction which, as the Court of Appeals panel unanimously pointed out in denying rehearing, is essentially a freak.[3/]

Third, the Court of Appeals' application of this settled principle to the unique facts of this case is plainly correct. The trial court informed the jury at the sentencing phase of respondent's trial that its sole task was to determine whether "the aggravating circumstances ... outweigh the mitigating circumstances." In making that determination, however, the jury was instructed to "consider only the follow-

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3/ A-78 to A-80 (opinion on denial of rehearing); see also A-70 to A-71 (opinion on original submission). In the District Court, counsel for the State of Mississippi, Assistant Attorney General Billy L. Gore, stated that his office had "all along" advised prosecutors to submit an instruction unlike the one given in respondent's case -- specifically, an instruction requiring the jury to consider not only the statutory mitigating circumstances present but also any "other mitigating circumstances that you, the jury, feel may be reasonably relevant to the issue of life or death." Habeas Corpus Transcript, at 60. The Mississippi Model Jury Instruction on mitigating circumstances (see A-79 to A-80), which has been in regular use in Mississippi capital cases other than respondent's since the State enacted its current capital-sentencing statute, similarly contains an "any other mitigating circumstances" formulation conforming to the eventual holding of the Court of Appeals below. See Gray v. State, 375 So. 2d 994, 1003-04 (Miss. 1979).

ing [two] elements of aggravation" and "the following [two] elements of mitigation," i.e., the two potentially applicable statutory mitigating circumstances.[4/] The jury had no way of knowing that it could consider the various nonstatutory mitigating circumstances in the case. The instruction accordingly created an unacceptably high "'risk that the death penalty [was] ... imposed in spite of factors which may call for a less severe penalty,'" Eddings v. Oklahoma, supra, 71 L.Ed. 2d at 13 (Justice O'Connor concurring), quoting Lockett v. Ohio, supra, 438 U.S. at 605 (plurality opinion of Chief Justice Burger) -- as the Fifth Circuit convincingly concluded. A-53 to A-71.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

/s/ Grady F. Tollison, Jr.

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4/ Trial Transcript, at 317. The instruction on mitigating circumstances given at trial is as follows:

> Now if one or more of these elements of aggravation is found to exist, then you must consider whether there are mitigating circumstances which outweigh the aggravating circumstances. Now consider the following elements of mitigation in determining whether the death penalty should not be imposed: One, that the defendant has no significant history of prior criminal activity and two, the defendant's age at the time of the capital murder.
>
> If you unanimously find from the testimony that one or more of the preceding elements of mitigation exist, then you must consider whether it outweighs the aggravating circumstances you previously found and you must return one of the following verdicts.

Trial Transcript, at 317 (emphasis added).

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ATTORNEYS FOR RESPONDENT

Dated: April 2, 1982.

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CERTIFICATE OF SERVICE

I hereby certify that I am co-counsel for respondent John Lewis Washington and am a member of the bar of the Supreme Court of the United States, and that I served this brief in opposition on petitioner by placing a copy in the United States mail, first class mail, postage prepaid, addressed as follows:

Catherine Walker Underwood
Special Assistant Attorney General
Post Office Box 220
Jackson, Mississippi 39205

All parties required to be served have been served. Done this 2nd day of April, 1982.

JOHN CHARLES BOGER

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MOTION TO PROCEED IN FORMA PAUPERIS

The respondent, John Lewis Washington by his undersigned counsel, asks leave to file the attached Brief in Opposition without prepayment of costs and to proceed in forma pauperis pursuant to Rule 46. Counsel has not yet received an affidavit from the respondent, who is presently incarcerated at the Mississippi State Prison in Parchman, Mississippi. Mr. Washington's affidavit in support of this motion will be forwarded to the Court immediately upon receipt.

Is/ Grady F. Tollison, Jr.

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AFFIDAVIT

STATE OF NEW YORK)
SS.:
COUNTY OF NEW YORK)

JAMES S. LIEBMAN, being duly sworn, states:

1. I am co-counsel for respondent John Lewis Washington, the respondent in the above-captioned action, and I make this affidavit in support of Mr. Washington's motion for leave to proceed in forma pauperis. My representation of Mr. Washington is without remuneration.

2. Mr. Washington is presently in the custody of the State of Mississippi and is not immediately available to sign an in forma pauperis affidavit. Such an affidavit has been sent to Mr. Washington by me and will be forwarded to the Court immediately upon receipt. A copy of the affidavit to be signed by Mr. Washington is attached hereto.

3. Counsel was appointed to represent Mr. Washington at his trial, on appeal, and in these federal habeas corpos proceedings, and Mr. Washington has been permitted by the lower federal courts to proceed in forma pauperis.

4. I am informed and believe that because of his poverty, Mr. Washington is unable to pay the costs of this cause or to give security for same.

5. I believe that Mr. Washington is entitled to prevail in this action.

JAMES S. LIEBMAN

Sworn to before me this
2nd day of April, 1982.

NOTARY PUBLIC

GERTRUDE A. REYNOLDS
Notary Public, State of New York
No. 24-4824270
Qualified in Kings County
Commission Expires March 30, 1983